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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 935

LOUIS COMPAGNA, PAUL DE LUCIA,
PHIL D'ANDREA, CHARLES GIOE
and JOHN ROSSELLI,
Petitioners,

vs.

UNITED STATES,
Respondent.

BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Counsel for Petitioners.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

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Summary of Argument—

Point One. Where an indictment alleges the formation of the conspiracy in a district (New York) as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district (Illinois), the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district.

This indictment does not comply with rules of pleading which require facts and not unsupported legal conclusions.

The language of the statute alone here is not sufficient.

The indictment, on its face, shows that the conspiracy cannot be prosecuted because of the Statute of Limitations.

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The allegation that something was continuous is a mere legal conclusion and should be rejected, there being no facts or description given to indicate any such conspiracy.

Considering the indictment with the evidence, it cannot be said that a continuing conspiracy was proved. The question was taken from the jury in charge.

Considering the indictment with the evidence, it cannot be said that the Statute of Limitations did not run. This question was also taken from the jury.

Matters known to the grand jury were alleged to be unknown.

Considering the indictment with the evidence, it is apparent that the prosecutor deceived the defendants as to the charge, gave them no accurate information and the prosecutor anticipated his desire for unlimited range in his proof 14

Point Two. The Act provides that it should not apply to organized labor. This being a circumstantial evidence case, it was necessary to prove what was done in order to prove that which was agreed upon. All the contacts between the victims and the conspirators were through labor representatives. Whether the exception applied became a mixed question of law and fact. The trial judge erred by instructing the jury that labor was not involved and by refusing to even refer to the exception. The case was tried as if the exception had never been incorporated in the Act. This met the approval of the Circuit Court in opposition to an applicable decision of this Court 31

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Point Three. The undisputed evidence showed that the acts related to the exhibition of motion pictures. The trial court regarded the exhibition of motion pictures as interstate commerce, as a matter of law, and so instructed the jury. The Circuit Court preferred to follow another circuit opinion in order to approve this error and at the same time rejected applicable decisions of this Court 42

Point Four. The courts below applied the literal meaning of the Act to make it apply to the exhibition of motion pictures and in such manner as to make the Act govern every state activity. Congress did not intend any such construction and if Congress did so intend, the Act is unconstitutional. Here too the Circuit Court rejected applicable decisions of this Court and gave preference to a decision in another circuit.. 51

Point Five. The trial court allowed the victims to tell what they feared and why they paid the money. This state of mind testimony was given years after the event and included what the victims had heard of the defendants since it was discovered that they were in the picture. It included hearsay evidence as to property damage, bombings, murders, which had been caused in the past during strikes. Strikes with which the defendants were not even thought to have been connected. The Circuit judge who wrote the opinion thought that this was error but to him it seemed harmless and did not prejudice the defendants. The other two judges thought that there was no error. All three judges ignored an applicable decision to the contrary in this court 53

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Point Six. Barger ran a burlesque house in Chicago. He was falsely designated as unknown to the grand jurors. Bioff forced a partnership upon Barger which originated with Barger's desire to stifle competition. D'Andrea was paid a salary by check although he did not work at the theater. The theory of the government was that this was paid pursuant to the conspiracy charged. The defense claimed that this was money paid for protection as against local police. In any event, it all had no connection with interstate commerce further than the fact that Barger exhibited motion pictures. The Circuit Court adopted a rule which would put the corner policeman into a national conspiracy upon receipt of money from Barger, if the policeman agreed to permit Barger to run an indecent show, sandwiched in with a moving picture 61

Point Seven. The trial court told the jury that there could be no defense for your petitioners under the Statute of Limitations if anybody, including the accomplice witnesses, did anything within three years, no matter whether the statute had already run as to your petitioners or not. The Circuit Court approved..... 64

Point Eight. The judge told the jury, in his charge, that he had to be careful because all was being taken down and if he made any mistakes they could be reviewed upon an appeal, that in such event the case might come back. Naturally the jury understood that a conviction would not be permitted to stand by the Circuit Court if the judge turned out to be wrong in his charge. The judge was in error but the Circuit Court did nothing 68

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Point Nine. No adequate summary possible, please see excerpts from record in Appendix p. 11.... 69

Every possible device was resorted to in order to slur and prejudice the defendants. The following is a partial list of the instances of which we complain.

The prosecutor said, in substance, that theater owners are vulnerable to acts of vandalism and violence because anybody, by payment of admission, can walk into a darkened theater. Damage to theater property means injury to the public. This was based entirely upon state of mind testimony which had been improperly admitted.

In his argument, he referred to the testimony of Coston and dwelt upon murders, bomb throwing and damage to theaters in 1931. Some shakedown money had been secured by Malloy who preceded Browne in control. This was not only state of mind testimony but was entirely unconnected, yet charged up to your petitioners.

The prosecutor testified in his argument that he had been to Chicago and had observed the operation of theaters.

In his argument, he criticised the basis used by the union in arriving at a wage scale.

He condemned any defense which the statute of limitations might afford by summarizing it to the effect that the criminal says you have caught me too late.

After the court had stricken evidence as to a conversation between an attorney, Korshak,

and Bioff because the prosecutor had failed to connect the defendants, the prosecutor proceeded to base an appeal to prejudice upon this testimony which had been stricken. He told the jury that these defendants instructed Bioff to perjure himself in his trial. An untruth which excused the accomplice and blamed your petitioners.

After the court ruled that the evidence of a deposit made by union officials to the credit of a baby born to Mrs. DeLucia was immaterial, and the prosecutor prevailed upon the court to admit the evidence for a limited purpose—to show control of the union—he made use of the evidence in an appeal to prejudice.

The prosecutor argued that Bioff was convicted of pandering while in the employ of D'Andrea, thereby implying that D'Andrea was in a reprehensible business. Also that D'Andrea assisted Bioff in making false representations to an insurance company. No relationship or connection was shown as to D'Andrea.

He argued, without any basis in the evidence, that some of the defendants were muscle men delegated to the convention to make sure that everything went right.

The prosecutor inferred without any evidence, that some of these defendants threatened the life of Sherman.

He said that the convention hall was policed by some of these defendants. He did not have a scintilla of evidence upon which to base this charge.

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The prosecutor appealed to prejudice by an argument based upon the relationship between Sherman and one Lepke, having no connection with these defendants and having nothing to do with the charge.

The prosecutor made reference to Al Capone and assassination which had nothing to do with this case.

The prosecutor appealed to prejudice by an unwarranted argument to the effect that this mob, as he called your petitioners, decided to kidnap the Actors' Union, and to give it to one of the defendants to play with. The evidence of the transaction had no place in the record, and it did not bear the insinuation.

The prosecutor unjustly and with no evidence at all accused Rosselli of shaking down Casey. Casey was in the employ of the magnates and not produced.

The prosecutor appealed to prejudice as against Rosselli because he happened to have been a guest in the Florida home of the Capone family, while Al Capone was in the penitentiary. Al Capone had nothing to do with the conspiracy charged, and it was unfair and prejudicial to call your petitioners Capone gangsters without any proof. This is a term easily applied to anyone we don't like, and is used in the manner employed in politics by calling the other fellow a communish without basis.

The prosecutor placed McLane upon the stand knowing that McLane had no informa-

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tion material here, merely in order that the prosecutor might argue that McLane was afraid to testify. McLane had been head of the bartenders in Chicago and to suit his own purposes, he claimed that some of your petitioners had tried to defeat him in election. This had no connection with the conspiracy charged here.

The prosecutor requested the jury to convict these defendants in order that he might secure some of them at a future trial as witnesses against higher ups. The record shows that the judge has held the term open for three years, and that those of your petitioners playing minor roles, if guilty at all, were sentenced to the maximum and denied bail. If the prosecutor has had an ulterior purpose all of the time, the jury and the court should not be concerned and the jury should not convict with the hope that a defendant might obtain immunity and receive the treatment accorded other accomplice witnesses in the case.

Point Ten. After the jury had been out and had sent notes to the judge indicating an inability to agree and a failure to remember certain testimony, the judge, according to his own statement, stopped in the jury room. The Circuit Court designated this as a mere "informality" and concluded, without foundation, that no harm was done. In another circuit it has been held that where the record fails affirmatively (as here) to disclose that no prejudice did result, the verdict cannot stand..... 78

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Point Eleven. The Circuit Court, in the case at bar, improperly failed to state some of the points involved and incorrectly stated others and rendered an opinion which does not disclose the grounds of decision..... 85

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Please also see

APPENDICES

The Anti-Racketeering Act, therein p. 3.

The Indictment in Full, therein p. 7.

Argument of Prosecutor, excerpts, therein p. 11.

Charge of Trial Court and Refused Instructions, therein p. 37.

Opinion of Circuit Court, therein p. 85.

Opinions of the Courts Below.

The trial judge filed no opinion. The opinion of the Circuit Court of Appeals before Judges Hand, Swan and Clark as written by Mr. Justice Learned Hand, not yet reported, is in the record (R. 4191). We submit herewith an appendix showing (therein p. 85), among other things, a copy of the opinion together with our notes calculated to show its errors of commission and omission.

Jurisdiction.

In conformity with the practice in the second circuit, no judgment was entered at the time of the filing of the opinion on December 20, 1944 (R. 4191). We filed our petition for rehearing (R. 4206) within the time allowed and it was denied upon January 8, 1945 (R. 4202). Because the court had under advisement a motion on behalf of Kaufman for a stay, the judgment and order for mandate was not entered until January 11, 1945 (R. 4203). We file this petition in less than thirty days from the denial of the petition for rehearing on January 8, 1945 (R. 4202, fol. 4240).

The jurisdiction of this court is invoked under section 347 of Title 28, United States Code. Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 936, Ch. 229. Appendix to Rules, 306 U. S. 727, 731. Rules of the Supreme Court, particularly Rule 38, 306 U. S. 716. Rule XI of the Rules for Criminal Appeals promulgated May 7, 1934.

Statement of the Case.

Reference is made to our Petition for Certiorari (pp. 1 to 11) for a statement of the case and also for a summary of the record, consisting of five printed volumes, submitted herewith.

The Errors Assigned.

The Circuit Court of Appeals committed error as follows:

1. In holding that the variance, between the indictment as to venue and the proof, was of no importance.

2. In holding that the variance, between the indictment and the proof of Barger as a victim, was of no importance.

3. In holding that the variance, between the indictment and the proof as to the identity of the conspirators, was of no importance.

4. In holding that there was no merit to the motion to quash made upon the following grounds: the allegation that the conspiracy was a continuing one was a mere conclusion with no facts alleged; the indictment, upon its face, showed that the statute of limitations had run; the language of the Act was not sufficient, conclusions and not facts were pleaded; no effort was made to negative the exception in the Act.

5. In holding that there was no error in the trial court based upon a showing that the grand jury actually knew about Barger, a victim, and Rio, a conspirator, and with such knowledge returned an indictment alleging that they were unknown. Of course if these persons were not referred to in the indictment the evidence as to them should have been excluded.

6. In holding that it was not error to deny a bill of particulars.

7. In holding that it was proper for the trial court to take from the jury the question as to whether the exception in the Act applies.

8. In holding that the test as to the objective of the conspirators was to be found in the state of mind of the

victims, and that the trial court did not err in admitting hearsay evidence in this regard.

9. In holding that interstate commerce was involved as a matter of law, and that the exhibition of motion pictures constitutes an engagement in interstate commerce; that the trial court did not err in taking this question from the jury.

10. In construing the Act literally and following its language to make it apply to a strike upon a local theater.

11. In holding that the trial court might properly instruct the jury that there was no defense under the statute of limitations if any defendant performed acts within the period; holding that the act of one (including the accomplice witnesses) bound all, including those who might have withdrawn.

12. In holding that hearsay evidence was properly admitted and made use of in the trial for the purpose of connecting the defendants to the conspiracy alleged.

13. In holding that it was proper for the trial judge to explain the right of the defendants to a review.

14. In holding that a visit on the part of the trial judge to the jury during its deliberations was a mere informality and that no prejudice could result.

15. In holding that the judge did not prejudice the defendants in the manner in which he read the testimony to the jury after the jury had retired to deliberate.

16. In holding that the actions, conduct, methods employed and argument made by the prosecutor was within permissible limits.

17. Your petitioners also adopt the assignment of errors filed by those convicted with your petitioners and who seek the writ of certiorari on the same record.

PROPOSITIONS OF LAW RELIED ON AND CITATION OF CASES.

Point One.

I.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such trial shall be held in the State where the said Crimes shall have been committed.

Article III, Sec. 2, Clause 3, Constitution of the United States.

II.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VI, Constitution of the United States.

III.

Questions of venue in criminal cases are not merely matters of formal legal procedure.

United States v. *Johnson*, ... U. S. ...., 89 Law Ed. 196.

IV.

The commission of an overt act in furtherance of conspiracy and its allegation are necessary to give local venue.

United States v. *New York Great Atlantic and Pacific Tea Co.*, 137 Fed. (2) 459 (C.C.A. 5).

See *De Mayo* v. *United States*, 32 Fed. (2) 472.

V.

Conspiracies under this Act are to be compared with those under the Sherman Act and are complete when formed. Venue can be laid in a district wherein the conspiracy is made effective, but in such case there must be a specification in the indictment of such overt acts as is sufficient for venue purposes.

See authorities collected in *United States* v. *Safeway Stores*, 51 Fed. Supp. 448 (Dist. C. Kas.), and in *Frankfort Distilleries* v. *United States*, 144 Fed. (2) 824 (C.C.A. 10).

VI.

If the history of liberty means anything, if constitutional guaranties are worth anything, this conviction can not be permitted to stand.

United States v. *Smith*, 173 Fed. 227, 232 (Dist. C. Ind.).

VII.

An indictment in the language of the Act here failed to inform the defendants of the cause of the accusation, and it was error to deny particularization or to refuse to dismiss.

United States v. *Cruikshank*, 92 U. S. 542.

United States v. *Carll*, 105 U. S. 611.

United States v. *Britton*, 107 U. S. 655.
Evans v. *United States*, 153 U. S. 584.
United States v. *Hess*, 124 U. S. 483.
Fontana v. *United States*, 262 Fed. 283.
White v. *United States*, 67 Fed. (2) 71 (C.C.A. 10).

VIII.

Persons known to the grand jurors should not be alleged as unknown.

United States v. *Riley*, 74 Fed. 210.
United States v. *Rhodes*, 212 Fed. 513.

IX.

Conspiracies under this Act are like the Sherman Act in this respect—they are complete when formed.

Nash v. *United States*, 229 U. S. 373.

X.

Venue should be laid in district where the conspiracy is formed. If the pleader wished to rely upon the law whereby in cases where the conspiracy is made effective by overt acts in the district of trial although formed elsewhere, the indictment should contain a specification of such overt acts for venue purposes.

See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.

XI.

Courts have been especially meticulous and rigid in requiring particularity and definiteness in venue allegations.

Skelley v. *United States*, 10 Cir., 37 Fed. (2) 503.
United States v. *Burns*, 54 Fed. 351, 359.

XII.

The language of this indictment is too general and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed he has committed mere conclusions should be rejected.

United States v. *Colgate Co.*, 250 U. S. 300.

And see authorities reviewed in *United States* v. *Armour & Company*, 48 Fed. Supp. 801.

Point Two.

The exception in the Act cannot be ignored and the court should have construed it for the benefit of the jury as applied to the facts here.

United States v. *Local 807*, 315 U. S. 521, affirming 118 Fed. (2) 684 (C.C.A. 2).

Point Three.

I.

The exhibition of motion pictures is not interstate commerce.

Mutual Film Corp. v. *Industrial Commission of Ohio*, 236 U. S. 230.

Schecter Poultry Corporation v. *United States*, 295 U. S. 495.

Fox Film Co. v. *Trumbull*, 7 Fed. (2) 715.

II.

The Circuit Court of Appeals held that a proposition (interstate commerce) usually one of fact, was one of law and therefore the question is reviewable here.

Mahnich v. *Southern S. S. Co.*, 321 U. S. 96.

III.

Refusal to properly instruct that the burden was upon the government to prove interstate commerce was error.

McAdams v. *United States,* 74 Fed. (2) 37 (C.C.A. 8).

IV.

As in the Sherman Act cases, Congress here had no intention of disturbing the balance between state and national governments.

Apex Hosiery Company v. *Leader,* 310 U. S. 469.

V.

Whether or not under the facts shown interstate commerce was involved should have been submitted to the jury for its determination.

Pennsylvania Company v. *Donat,* 239 U. S. 50.

Point Four.

I.

It must be presumed that Congress intended to legislate within its power otherwise the Act is unconstitutional. It cannot mean any interference with commerce no matter in what degree, as held below in this case.

United States v. *Gramlich,* 19 Fed. Supp. 422.

See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469.

Point Five.

I.

The state of mind of the victims is not material in proof of the objective of the defendants.

United States v. *Local 807,* 315 U. S. 521.

Point Seven

I.

The withdrawal from a criminal conspiracy may be shown by circumstantial evidence.

Buhler v. *United States*, 33 Fed. (2) 382 (C.C.A. 9).

II.

Hearsay declarations cannot be used to connect a defendant with conspiracy.

Glasser v. *United States*, 315 U. S. 60.

Nibbelink v. *United States*, 66 Fed. (2) 178, (C.C.A. 6).

Minner v. *United States*, 57 Fed. (2) 506, (C.C.A. 10).

Morrow v. *United States*, 11 Fed. (2) 256, (C.C.A. 8).

III.

Circumstances which are consistent with any reasonable theory of innocence are insufficient.

Kassin v. *United States*, 87 Fed. (2) 183, (C.C.A. 5).

Graceffo v. *United States*, 46 Fed. (2) 852, (C.C.A. 3).

Dahly v. *United States*, 50 Fed. (2) 37.

Salinger v. *United States*, 23 Fed. (2) 48, (C.C.A. 8).

Tucker v. *United States*, 224 Fed. 833, (C.C.A. 6).

IV.

Those having no knowledge of the conspiracy are not conspirators.

United States v. *Falcone*, 311 U. S. 205, 210 (C.C.A. 2).

United States v. *Crimmins*, 123 F. (2) 271, (C.C.A. 2).

V.

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations.

The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly with others consented or agreed to the existence of a former conspiracy within the three years and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue.

Ware v. *United States*, 154 Fed. 577.

Point Eight.

I.

It was improper for the court to make reference to the right of review.

McDonald v. *People*, 126 Ill. 150, 153, 18 N. E. 817.

Cleveland Ry. v. *Locke*, 26 Ind. App. 269, 123 N. E. 816.

Point Nine.

I.

We have here a case where the misconduct of the prosecutor was pronounced and persistent with a cumulative effect upon the jury which cannot be disregarded as inconsequential.

Berger v. *United States,* 295 U. S. 78, 89.

Point Ten.

I.

There should be no communication between court and jury except in open court.

Little v. *United States,* 73 Fed. (2) 861 (C.C.A. 10).

II.

Where the record, as here, does not affirmatively show that no prejudice resulted, the error of communication with the jury is reversible. The burden to show prejudice is not on your petitioners and section 391 of Title 28 U.S.C. does not render the error harmless.

Little v. *United States,* 73 Fed. (2) 861.

III.

Congress, by section 391 of Title 28, United States Code, did not intend that where there have been substantial infringements on the right to a fair trial, the court of review can ignore them.

Bruno v. *United States,* 308 U. S. 287.

McCandless v. *United States,* 298 U. S. 342.

And other cases cited in dissent to *United States* v. *Liss,* 137 Fed. (2) 995, 1005 (C.C.A. 2).

Point Eleven.

Opinion Rendered Here by Circuit Court.

I.

The principle of publicity, which governs in the American judicial process, calls not only for trials held in public but also for the publication of judicial opinions that disclose the grounds of decisions; that publicity is illusory if the true grounds are not stated.

See dissent by Judge Frank in *United States* v. *Liss*, 137 Fed. (2) 995, 1002 (C.C.A. 2).

ARGUMENT.

Summary of Point One.

Where an indictment alleges the formation of the conspiracy in a district (New York) as the sole basis of venue, without alleging the commission of any overt act in furtherance of the conspiracy, and the proof shows the formation of the conspiracy in another district (Illinois), the trial Court is without jurisdiction even though there be proof of the commission of unalleged overt acts within the trial district.

This indictment does not comply with rules of pleading which require facts and not unsupported legal conclusions.

The language of the statute alone here is not sufficient.

The indictment, on its face, shows that the conspiracy cannot be prosecuted because of the Statute of Limitations.

The allegation that something was continuous is a mere legal conclusion and should be rejected, there being no facts or description given to indicate any such conspiracy.

Considering the indictment with the evidence, it cannot be said that a continuing conspiracy was proved. The question was taken from the jury in the charge of the court.

Considering the indictment with the evidence, it cannot be said that the Statute of Limitations did not run. This question was also taken from the jury.

Matters known to the grand jury were alleged to be unknown.

Considering the indictment with the evidence, it is apparent that the prosecutor deceived the defendants as

to the charge, gave them no accurate information and the prosecutor anticipated his own desire for an unlimited range in his proof.

Point One.

There was a fatal variance between the indictment and the proof as to venue.

It now appears, from the entire record, that the positive direct allegation of the indictment, that the conspiracy was formed in New York is not only false but it was known to be false by the prosecutor and the grand jury.

The Circuit Court of appeals dismissed this point as trivial. That court did not even see fit to state our point. Your Honors will not find the word venue in the opinion.

The Circuit Court of Appeals said (R. 4195):

> "We do not find it necessary to discuss the several alleged variances between the indictment and the proof, neither cumulatively, nor in detail, could they have misled the defense; the substance of the charge and the proof were in entire accord."

Your Honors must know that our point cannot properly be dismissed in such manner. Whether or not the defense was misled is only a small part of our point. Those who were transported for trial in 1812 knew they were to be tried in England and were not misled as to the sort of trial in store for them. They fought a war because they knew of the unfair advantage taken by the crown. The framers of our constitution did not contemplate that transportation for trial could be accomplished here from coast to coast.

Your Honors said in *United States* v. *Johnson*, ... U. S. ...., 89 Law Ed. 196:

> "Aware of the unfairness and hardship to which

trial in an environment alien to the accused exposes him, the framers wrote into the constitution that 'the Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed. * * *' " Article 3, Sec. 2, Cl. 3.

"As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' Sixth Amendment.

"Questions of venue in Criminal cases, therefore, are not merely matters of formal legal procedure."

These defendants, except Rosselli, who was removed from California, were removed from their homes in the Chicago area, Illinois. The indictment alleges, in no unmistakable terms, that the conspiracy was formed within the jurisdiction of the court below.[1] No effort was made to prove this allegation. If we assume, from all of the evidence, that the formation of the conspiracy was proved at all, it was entered into in Illinois. No other claim was made by the prosecutor.[2]

The prosecutor, in referring to a conversation in Illinois, said (R. 3638, Vol. IV, fol. 10, 914):

Mr. Kostelanetz: "That is when the conspiracy with these defendants, I submit, started."

Your Honors will perceive, from the evidence, that in the case at bar, the formation of plans and policies which

[1] In considering this variance as to venue, we request your Honors to assume that the indictment is good as a pleading. The Circuit Court treated our complaint as if we merely attacked the indictment. The Circuit Court said our position is curious in the face of Sec. 556 of Title 18 U. S. C. (R. 4195)

We have copied the indictment in full in our appendices (therein p. 7).

[2] We refer your Honors to the closing argument of the prosecutor (R. 3639, Vol. IV, fol. 10,915) where he referred to the origin of the alleged conspiracy in Illinois. Mr. Kostelanetz said:

"That is the beginning of the march of these men with the many names."

would include, of course, the formation of the alleged conspiracy, is foreign to the New York judicial district. No defendant had his residence in the place of trial. None was found in New York. The witnesses were not found in New York. Most of them were transported also.

Your Honors know, of course, that if this indictment had alleged that the conspiracy had been formed in Illinois without any further allegation, the courts of the home district would never have ordered the removal of these defendants, nor would any waiver on removal have been accepted. The defendants consented to removal in order that they might meet the charge in the indictment, *i. e.*, that they conspired in New York. The policy of the law, and fairness, does not admit of the removal of a defendant on one charge, to be eventually convicted of another. We submit that this defect alone is vital and fatal to this conviction.[4]

In *United States* v. *New York Great Atlantic and Pacific Tea Company*, 137 F. 2d 459 (Fifth Circuit), the trial court sustained a demurrer to the indictment. The Circuit Court reversed the trial court after a discussion of the point made below that the indictment did not allege facts showing that the venue jurisdiction was properly laid. It must be clear that the Circuit Court in the *A. and P. case* correctly assumed that if no allegation of local venue was made, the indictment could not have been sustained. The Circuit Court of Appeals in the case at bar necessarily disregarded and conflicted with all that was said on the point in the *A. & P.*

[4] Your Honors will notice that the trial court refused to submit the question of venue to the jury. Nos. 70 and 71. (R. 3773, Vol. IV, fol. 11,318) (Price v. U. S., 68 F. 2d 133; Summers v. U. S., 11 F. 2d 583.) We call attention to these refused instructions to show how desperately counsel strove for some consideration in the trial court. As we have said in our petition, the trial judge did not even request the government to advance a theory or offer an excuse for this high handed method of selecting the tribunal. This point was also urged upon the court in a motion for a directed verdict. (R. 2630, Vol. III, fol. 7890)

case. No mention of the *A. & P. case* is made in the opinion here.

In *De Mayo* v. *United States*, 32 F. 2nd (C.C.A. 8) 472, certain overt acts were committed by government agents. The agents were incompetent under the facts to become conspirators. It was held that their acts could not furnish proof of venue in the district where the indictment was found. In the case at bar, none of the defendants performed any act in New York. If they ever acted in New York, as far as this case is concerned, they were in New York by virtue of the agency which the alleged conspiracy was supposed to create in Bioff, Browne and Circella, all labor officials. Cases in circuits other than the second do not regard the matter of venue in the indictment and in the proof as trivial. We refer to *the Mayo case* because the court there looked into the proof after the pleader had made what must have appeared to have been sufficient allegations of overt acts to create venue. The charge was good if it had been brought in another district.

As was said in *United States* v. *Smith*, 173 F. 227, 232 (D. C. Ind.):

> "If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the government has that power, and can drag citizens from distant states to the capital of the nation, there to be tried, then as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial."

The *Smith case* arose on an application for removal of a newspaper editor for trial in Washington. The judge looked into the evidence to determine how the government expected to establish venue. It never occurred to the prosecutor that he could have alleged that the libel was printed

in Washington and then rely upon the Washington court to regard the variance as trivial.

To evade this point is to besmirch the public reputation of judicial proceedings. Everyone who knows anything at all about the case at bar knows that the defendants were transported for trial. If such action is legal and not in violation of the constitution, it should have been the duty of the trial court and the Circuit Court to explain some theory or basis upon which this could be done within the law. If it was illegal, it became the duty of the lower courts to say so. (See 137 F. (2) 1002) Any well informed layman knows that the point is not trivial.

We venture to say that the removal of a large number of persons for trial in Washington recently in the sedition cases, (*United States* v. *McWilliams*, 54 Fed. Supp. 791) did the public reputation of judicial proceeding and the country more harm than enemy propaganda.

We here present a case where no excuse, good or bad, has been offered. The government arbitrarily selected the place of trial by a resort to falsehood. The supervisory power of this court is sorely needed.

In *United States* v. *Safeway Stores*, 51 Fed. Supp. 448, the trial court sustained a demurrer to indictments under the Sherman Act. This decision was reversed in *Frankfort Distilleries* v. *United States*, 144 Fed. (2) 824, (C.C.A. 10). The Circuit Court divided and the majority differed with the trial court on the sufficiency of the indictment. The authorities are collected and all opinions furnish an able discussion on the subject of venue allegations in conspiracy. Everyone connected with the case, including the prosecutors, assumed that in a situation where the conspiracy was formed outside of the jurisdiction of the

court, it was necessary to include in the indictment some facts upon which local venue could be derived. The prosecutors there did not presume to make a false allegation that the conspiracy was formed in Dallas. Such an allegation would have defeated the demurrer, but it would only have borrowed trouble. The prosecutors must have known that a variance would be fatal.

In the case at bar we have copied the indictment (R. 4, Vol. I) into an appendix (therein p. 7) and wish to direct attention to its insufficiency.

Permit us to start with a landmark decision interpreting the constitution, *i. e., United States* v. *Cruikshank*, 92 U. S. 542. It is our contention that this attempt in the case at bar to charge a criminal offense is wholly lacking in the clarity and particularity requisite to inform your petitioners of the nature and cause of the accusation as required by the Fifth and Sixth Amendments. (*Fontana* v. *United States*, 262 Fed. 283; *Nash* v. *United States*, 229 U. S. 373; *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344, 360; *Sugar Institute* v. *United States*, 297 U. S. 553; *United States* v. *Colgate and Company*, 253 Fed. 522, affirmed 250 U. S. 300; *Standard Oil Company* v. *United States*, 221 U. S. 1; *United States* v. *Carll*, 105 U. S. 611; *White* v. *United States*, 67 Fed. (2) 71 (C.C.A. 10); *Asgill* v. *United States*, 60 Fed. (2) 780 (C.C.A. 4).

No overt act is laid. This would not be a valid objection (*Nash* v. *United States*, 229 U. S. 373), except that here we don't even have any acts alleged by way of description. Overt acts should have been alleged to fix venue.

Your Honors will note that a bill of particulars was refused (R. 37, Vol. I).

We submit that the Act in this case is like the Sherman Act in that it is couched in general language and fails

to enter into details. An indictment in the language of the Act, as here, is not sufficient. (*United States* v. *Carll*, 105 U. S. 611; *United States* v. *Britton*, 107 U. S. 655; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Hess*, 124 U. S. 483; *Evans* v. *United States*, 153 U. S. 584; *Moore* v. *United States*, 160 U. S. 268; *Manley* v. *Georgia*, 279 U. S. 1.)

As suggested in *United States* v. *Armour & Company*, 137 Fed. (2) 269 (C.C.A. 10), we shall examine this indictment as a whole, for the purpose here and now to show that it was error to deny particularization. The Circuit Court regarded our points as trivial and said that it was curious that we should complain at all, in view of Section 556, Title 18 U.S.C. Of course, your Honors know that constitutional provisions cannot be qualified or amended by statute or decisions. (*Asgill* v. *United States*, 60 Fed. (2) 780.) In circuits other than the second, it has been held that Congress did not intend to change the law at all, but merely enacted into statute the rule as to harmless error, directing that formal defects be disregarded. (*Little* v. *United States*, 73 Fed. (2) 861, 866 (C.C.A. 10) where authorities are collected.) (See dissent in 137 F. (2) 995 (C.C.A. 2).)

After the allegation as to time, the indictment tells of the place (and this is the only allegation as to place, and this is all to be found in the indictment on the subject):

> "In the Southern District of New York and within the jurisdiction of this court."

Now as to what they did. After naming the defendants (plus unknowns), it is alleged that they

> "in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce, did unlawfully, wilfully and knowingly

> conspire, combine, confederate and agree together and with each other to obtain and to attempt to obtain by the use of and attempt to use and threat to use force, violence and coercion, the payment of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, from a group of corporations,"

including (naming companies, plus unknowns)

> "all of the aforesaid being hereinafter referred to as the victims, and to obtain the payment of said money and said other valuable considerations, said moneys and said valuable considerations being the property of the aforesaid victims, with the consent of said victims induced by wrongful use of force and fear."

The union connections of the labor people are described and it is alleged that the victims were in interstate commerce.

That it is a part of the conspiracy that the defendants would control the union.

That they as a part of the conspiracy

> "would obtain and attempt to obtain, by the use of and attempt to use and threat to use force, violence and coercion, the payments of money, to wit, upwards of $1,000,000, and other valuable considerations, the exact amount and nature of said sums of money and said valuable considerations being to the Grand Jurors unknown, and would obtain the property of the aforesaid victims, with the consent of the aforesaid victims, induced by wrongful use of force and fear, that is to say, by demanding that said victims pay over to said defendants and said confederates the aforesaid sums of money and other valuable considerations for protection, viz., to prevent and dissuade said defendants and said confederates from restraining, impending and obstructing the production, interstate distribution and exhibition of motion pictures of the aforesaid victims throughout the United

States and otherwise injuring and destroying and attempting to injure and destroy the business of said victims."

That they would extort money for their own use against the Act, etc.

Permit us to strip the indictment down further in order to expose the conclusions. The indictment charges that your petitioners combined

"in connection with and in relation to acts."

What acts? To use

"force, violence and coercion."

What force? What violence? How did they agree to coerce? It is said that they agreed to get the money

"induced by wrongful use of force and fear."

We ask how induced? What force? What fear?

These conclusions are repeated again where it is alleged that it

"was a part of said conspiracy"

meaning, of course, that the pleader stood on his first conclusions as to the conspiracy.

They agreed to demand that the victims pay the money for protection. "Protection" is another conclusion. The protection was, viz., "to prevent and dissuade" (which, of course, are not the same and one is inconsistent with the other) the defendants from restraining commerce and otherwise destroying and injuring the business of the victims.

There is nothing about restraint of commerce in the Act. We ask again how did your petitioners agree as to what they were going to do about commerce here, how were they to "otherwise" injure and destroy? Is this not a blanket charge?

Your Honors will not find the word "strike" in the indictment. It says the defendants "as a part of the conspiracy" would dominate the union, but this allegation is not connected up in any way. Your petitioners were left to guess what they were to prepare to meet.

Now, after your Honors perceive the poverty of the indictment, permit us to examine the time allegation.

The only time alleged is:

> "heretofore, to wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the filing of this indictment (March 18, 1943)."

The gist of the offense is the conspiracy. The crime in this case was committed on or about June 18, 1934. Under Section 582 Title 18 U.S.C. this prosecution must have been brought within three years. We are aware of cases like *United States* v. *Kissell*, 218 U. S. 601, holding that conspiracies may be continuous, but we submit that there must be some facts pleaded or a description of the conspiracy to show that it was the sort of partnership in crime that was intended to continue like a business. Here all we have is the conclusion of the pleader that something or other was "continuously thereafter."

This Act is not like the Sherman Act in the following respect—the Racket Act prohibits "acts" and conspiracies to "act". The indictment says that your petitioners combined to "act".

If the nature of the "acts" were such that they could be expected to continue, it might be possible to describe a continuous conspiracy. From the four corners of the indictment, it does not appear why the defendants should want to conspire and conspire continuously without getting the money (only one sum is indicated), and when

they did get the money, no reason appears as to why they should continue to conspire.

Suppose we look at the evidence to see if a continuing conspiracy was proved. The government relied upon circumstantial evidence so we must look to see what was done to learn what the agreement was. Giving the government every reasonable inference, here is what happened to the victims named. Bioff said, in effect, now that you see what we can do, we want so much a year. The victims got the money and paid it for the first year. Everyone knew that if Bioff should die or lose control, that he wouldn't come around next year. So it all may have been an agreement to stay in business as long as possible, but no one could say for certain that ten years ago the conspirators agreed to a ten year plan. They must have known of the uncertainties and the necessity of renewing the pressure, if possible, and getting the money. The evidence could reasonably be construed not to show a continuing conspiracy, but the jury was told that this necessarily was one. (R. 3731, Vol. IV, Appendix p. 61)

Our discussion of the facts at this point may suggest some of the circumstances the pleader might have put in the indictment from which he concluded that this was all continuous.

In *Nick* v. *United States*, 122 Fed. (2) 660, the pleader not only included facts from which his conclusions were drawn, but he negatived the exception in the indictment. We submit that the exception is so interwoven with a definition of the offense that it should have been referred to in the indictment in the case at bar. (See note 153, A.L.R. 1218)

Now as to venue we shall again look to the evidence. A motion to quash could properly be met by the positive allegation that the conspiracy was formed in New York.

As was said by Judge Eicher in *United States* v. *McWilliams*, 54 Fed. Supp. 791, 794:

> "Standing as we do at the threshold, the allegations of the indictment are controlling and the court is without discretion."

The trial judge in the case at bar of course, did not continue to stand at the threshold, and the Circuit Court was never in that position. Relief was denied below, after the courts were made aware of the true situation and the falsity of the venue allegation.

In order to comply with the constitutional requirements, the place of the offense must be charged with particularity. (Constitution Art. 3, sec. 2, Cl. 3 and the Sixth Amendment; *Skelley* v. *United States*, 37 Fed. (2) 503 (C.C.A. 10.))

Permit us to assume that venue can be laid in a district wherein the conspiracy is made effective by overt acts, although formed elsewhere, and that specification in an indictment of such overt acts is sufficient for venue purposes. (*United States* v. *Trenton Potteries Company*, 273 U. S. 392, 402; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 250.) This is based upon the fiction that overt acts in furtherance of a conspiracy constitute a renewal or reformation of the conspiracy in the district of trial. The government, in the case at bar, should not be permitted to rely upon this fiction when they have pleaded no overt acts. If the evidence will bear the conclusion that overt acts in furtherance of the conspiracy were in fact committed in New York, that will not save the situation. In the *Socony Oil case* your Honors divided over the question as to whether the overt acts relied upon for venue were sufficiently pleaded, and if in fact, they were overt acts in furtherance of the conspiracy. Are your Honors going to allow the prosecutor to not plead

the venue facts at all where the conspiracy was formed elsewhere? In the case at bar, the prosecutor was not required to disclose in advance what acts in New York he intended to rely upon for venue. All he was required to do was to dump the evidence in and then ask us to wonder what he did finally rely upon for venue. When we inform your Honors that the prosecutor claimed at the trial that the conspiracy was formed in Illinois and that he never made any other claim and further that the government can not base any other claim upon the record now are your Honors going to set up a search of the record to determine if there is any proof of the venue allegation? None is to be found. The Circuit Court said there was a variance but that it is unimportant.

As we have said, the trial court never required the prosecutor to state his position or point out the facts upon which he relied upon for venue. The Circuit Court refused to state our point.

In *United States* v. *Safeway Stores*, 51 Fed. Supp. 448, the trial court held that allegations (set out) to the effect that the conspiracy was carried out in part in the jurisdiction of the court were inadequate. "Summed up they are nothing more than conclusions" (p. 456). Judge Hopkins said (p. 457):

> "—it would have been a simple matter to make a specific charge with reasonable particularity of time, place and circumstances. An indictment in that form would have properly pleaded an overt act, and the defendants would thereby have been given knowledge in advance of the trial."

Judge Hopkins displayed clear knowledge of the law as declared by this Court that ordinarily an allegation as to overt acts is unnecessary in Sherman Act cases. But it should be obvious as it was to Judge Hopkins that such allegations are necessary where

the conspiracy was formed out of the trial district. The majority in the Circuit Court, *Frankfort Distilleries* v. *United States*, 144 Fed. (2) 824 (C.C.A. 10), held the indictments sufficient. From the dissenting opinions, it appears that the judges divided over the sufficiency of the venue allegation. Could it be possible that any court would have allowed the government to evade all of the known rules of pleading and the constitutional rights of the defendants by merely alleging the formation of the conspiracy in Dallas, and then sustaining a conviction on evidence that it was formed elsewhere and carried out in part in Dallas? The answer, of course, must be no. Could the government have satisfied your Honors in the *Socony Oil case* by a false allegation that the conspiracy was formed in Wisconsin? There could have been no division here in answer to that question.

As was said in *White* v. *United States*, 67 Fed. (2) 71, 79 (C.C.A. 10):

> "In dealing with laws which are intended equally for the protection of the innocent as well as the punishment of the guilty, too much latitude should not be indulged solely for the purpose of arriving at a desired result in an individual case. The looseness in criminal pleading brought to light in this case should not receive encouragement through judicial sanction."

Not only is the indictment stated in legal conclusions and in general and indefinite terms, but many matters are laid under a *videlicit* and stated to be unknown. It was developed at the trial that matters alleged to be unknown were in fact known to the grand jury.

Point One A.

It appeared in the proof that Barger who is referred to in the indictment as unknown was actually known to the grand jury, so there was also a fatal variance in this respect.

The fact that Barger was before the grand jury and known to that body appears from the record (R. 2110, AE 164). Judge William H. Taft reviewed the law upon the subject in *United States* v. *Riley*, 74 Fed. 210, from which we quote (212):

> "If it appear in proof, however, that the persons referred to as unknown were actually known to the grand jury, then there is a fatal variance. *Guthrie* v. *State*, 16 Nev. 667, 670, 21 N. W. 455; *Com.* v. *Gallagher*, 126 Mass. 54; *Com.* v. *Hill*, 11 Cush. 137; *Rex* v. *Bush*, *Russ. & R.* 372; Whart. Cr. Pl. & Prac. sec. 113."

In directing a verdict Judge Taft said (213):

> "In my view of the law, it was therefore the duty of the grand jury to have included in the indictment the names of those who were known, and, this not having been done, the proof here does not sustain the indictment as it is charged. I must, therefore, direct you to return a verdict for the defendant. You do this upon the responsibility of the court."

Point One B.

It appeared from the proof that Rio was known as a co-conspirator to the grand jury. Rio is referred to, if at all, as unknown. Here too there is a fatal variance.

It may be said that the government built its case largely on conversations with Rio as testified to by Bioff which fact was known to the grand jury. We submit that the name of Rio in the indictment was necessary to identify

the crime charged. As was said in *United States* v. *Rhodes*, 212 Fed. 513, allegations that material matters are unknown are permissible from necessity only, when the grand jury does not have and cannot obtain a knowledge of the facts. Even the authorities holding that no error was committed. (*Jones* v. *United States*, 11 F. 2d 98; *United States* v. *Heitler*, 274 Fed. 401) suggest that such a case as this might arise in which the error is fatal. In the case at bar the general nature of the indictment, the trial held a long ways from home, the denial of a bill of particulars, all support our claim that there was a deliberate and successful effort on the part of the government to mislead and deceive the defendants. In some of the authorities which appear against our proposition the conspiracy was fully described and overt acts were pleaded. In *Fox* v. *United States*, 45 F. 2d 364, it was noted that the defendants might have obtained a bill of particulars. In *Durland* v. *U. S.*, 161 U. S. 306, the absence of a motion for a bill of particulars was also noticed.

Your petitioners were required to endeavor to prepare to meet the testimony of Bioff to be given by this accomplice witness a thousand miles from the home of your petitioners. It will be seen that Bioff testified to conversations between him and Rio who was dead. The defense should have been given an opportunity to check in advance of trial on the movements of Rio. Roach appeared for the government (R. 2363, Vol. III; R. 2951, Vol. IV) and said that he delivered a package of money at the request of Kaufman to Nitto in Chicago. Nitto, named as a defendant, was also deceased at the time of the trial. The defense was able to prove that Nitto was in Hot Springs, Arkansas, at the time Roach said he met him in Chicago. Need we argue the value of the constitu-

tional safeguards requiring the prosecution to inform the defendant in the indictment, what, where, when and how,—to furnish such a description of the charge against him as will enable him to make his defense.

Please see our appendix (pp. 97, 98) where we have reprinted the opinion of the Circuit Court and have pointed out all that was said there on the subjects here under discussion.

Summary of Point Two.

The Act provides that it should not apply to organized labor. This being a circumstantial evidence case, it was necessary to prove what was done in order to prove that which was agreed upon. All the contacts between the victims and the conspirators were through labor representatives. Whether the exception applied in the case at bar became a mixed question of law and fact. The trial judge erred by instructing the jury that labor was not involved and by refusing to even refer to the exception. The case was tried as if the exception had never been incorporated in the Act. This grievous error met the approval of the Circuit Court in opposition to an applicable decision of this court.

Point Two.

It was error to take from the jury the question as to whether the Act applied by reason of its exceptions.

In *United States* v. *Local 807*, 315 U. S. 521, it appears from the opinion of this Court that the trial court gave two instructions set out in the opinion of this Court. These instructions embodied the erroneous theory of the govern-

ment in that case. In the *Teamsters case*, the government endeavored to make a jury question out of what the prosecutor regarded as a proper construction of the statute as applied to the facts in that case. The government attorneys there failed to properly construe the Act and consequently the court erred in adopting the theory of the prosecutor. Reversal followed.

In the case at bar, the government avoided all complications by entirely ignoring the exception in the statute. The prosecutor succeeded in prevailing upon the court to decide against any application of the exceptions in the statute, as a matter of law. The government made no effort to embody any theory concerning the exceptions in any instruction. The charge as a whole took the question from the jury.[5] In the matter of admitting and excluding evidence, upon the charge to the jury, and at every step in the trial, the court decided, as a matter of law, that the exceptions in the statute did not apply and that the jury should not hear of the exception.

It is our contention that the question, as to whether the exceptions apply, is a mixed one of law and fact. We contend that this question should have been submitted to the jury under proper instructions. We quote from the opinion by Judge Learned Hand in the *Teamsters case* (118 F. 2d 684, 689, affirmed 315 U. S. 521):

> "We shall assume arguendo that, had the issue been properly presented to the jury, there was evidence to sustain a verdict against these men.

[5] We have copied the entire charge of the court in the case at bar as an appendix. Your Honors will find that we have supplied bold face type in order to point out the portions of the charge claimed to be erroneous. Of course, the absence of instructions will have to be determined from the charge as a whole. We have copied also some of the refused instructions with appropriate references to the record in order to show that every effort was made at the trial to secure a correct decision. We have interspersed our notes in italics in order to show the many prejudicial errors. (Appendix pp. 37 to 84)

> "That assumption will not change the result because the issue was not properly presented. * * *
>
> "A verdict should not stand when the jury has been so far misdirected upon the very kernel of the case. * * * There was really nothing left for them to decide if they concluded that the payments had been extorted by threats."[6]

In the case at bar, we submit that the jury was so far misdirected upon the very kernel of the case, as to leave nothing for them to decide, if they concluded that payments were made because of the fear had by the employers of the power exercised by the union. In the instant case, there could be no question but what payments were made because of fear of the power of the union. This fact could not be disputed. Nothing was left by the court for the jury to decide in our case.

In the *Teamsters case* Mr. Chief Justice Stone dissented but we notice that the Chief Justice took care to point out that the instructions covered his view of the meaning of the exception as applied to the facts in that case (315 U. S. 521, 539).

Our point in the case at bar is good regardless of whether the majority opinion of this Court or the dissent be consulted in the *Teamsters case*. The exception has some meaning and it was involved in our case whether your petitioners are guilty or innocent, and the trial judge had no right to take it from the jury any more than he had a right to direct a verdict of guilty.

We quote from the charge of the court as given in the trial of this case (R. 3735, Vol. IV, fol. 11, 203; Appendix p. 66):

The Court: "We do not have to decide whether

[6] Although Judge Hand wrote both opinions, no reference is made in the case at bar to the *Teamsters case*.

> the condition of the laboring man was benefited by these disputes or what transpired."

The defendants endeavored to touch upon the issue by an instruction (16) which was refused (R. 3780, Vol. IV, fol. 11, 338; Appendix p. 77).

We submit that the prosecutor purposely ignored the exception in the statute as appears from the entire record, including his argument (R. 3658, 3711, Vol. IV; Appendix pp. 27, 35).

Your Honors will observe from the record, that every cent of money was obtained by an official of a labor union, and all of the threats were based upon the power exercised by labor officials.[6a] Your Honors must know that Congress, in deference to labor, did not choose to exercise the full limit of federal jurisdiction. Your Honors can't think for a moment that the leaders of labor would have been satisfied with the exceptions, if the exceptions might properly be ignored, as in the case at bar.

If this conviction is to be sustained, it means that a federal judge has a right to consider the conduct of a labor official and decide as a matter of law, that the federal courts have jurisdiction, and that the exception does not apply, and to decide further that the jury should not hear of the exception.

In the case at bar, the Court indicated clearly that it was important to determine if these union officials paid the money into the union, as appears from the direct examination of Bioff. (R. 201, Vol. I, fol. 602)

The Court, in effect, requested Bioff to pass upon the state of mind of the victims, and their purpose in making payment. All of the facts in the case would warrant the jury in believing that the money was paid to Bioff and

[6a] We purposely disregard Barger for reasons which will appear.

Browne as labor officials. The fact that these officials embezzled the money after they received it should not change the situation.

In the matter of the first $20,000 obtained from Balaban & Katz (R. 119-122, Vol. I), the union officials represented that the money was to be used for a soup kitchen, a charitable enterprise, conducted for the benefit of the union. The employers paid this sum as a matter of expediency. They admitted that they feared that if an increase in wages had been awarded, the employers feared that raises would have been demanded by other unions. If the embezzlement of the money by the officials gives the federal court jurisdiction, then it follows that keeping part of it would taint the transaction. If a soup kitchen can be used as a pretense, so can a trumped up jurisdictional dispute.

If this conviction is to be sustained, the federal courts will be empowered to inquire into the internal affairs of every union where a strike occurs, or is threatened, to see if the officials have betrayed their trust.

Such was not the intention of Congress as appears from the language of Judge Clark in the *Teamsters case*, from which we quote. Speaking of the exception in 420d of the Act, Judge Clark said (118 F. 2d 684, 689, affirmed 315 U. S. 521):

> "It (the exception) may therefore mean in effect that the acts of violence here made a federal crime do not include such acts when occurring in otherwise legitimate activities of bona-fide (*i. e.*, non outlaw) labor organizations. If the word 'otherwise' should be omitted from this statement, if the acts of violence themselves render the union activities not legitimate, then the proviso becomes wholly meaningless, since it would then say that union activities are excepted only when they do not violate the act."

If Judge Clark[5a] had applied this reasoning to the case at bar he would have said that when it appears from the evidence that a union official has received money from an employer, the inquiry should end right there. Congress did not intend to supervise the traditional activities of union officials.

The Circuit Court of Appeals, in our case, begged the question as follows (R. 4195, fol. 4196; Appendix p. 95):

> "But if the accused at bar were not concerned in any wage dispute, but threatened to call strikes, not in the interest of the workmen; but to feather their own nests, they coerced their victims within the meaning of the section. The judge should have left to the jury nothing more than he did."

The use of the word "if" indicates that other conclusions were open. It must be remembered that those who collected the money were always concerned in wage disputes, and an improvement of the union and its members. The prosecutor conceded this in argument (R. 3671, Vol. IV). We submit that this holding by the Circuit Court renders the proviso meaningless, since it would then say that union activities are excepted only when the court deems the objective to be solely for a union purpose.

Nowhere in this long record has the prosecutor intimated or suggested that the union involved was an outlaw union, or that the officials were not lawfully elected or appointed. The various local unions and the IATSE were regularly and duly affiliated with the American Federation of Labor. Browne was a vice president of the American Federation of Labor. Regardless of the character of Bioff, he had been regularly appointed as an assistant to Browne

[5a] Judge Clark sat with Judge Learned Hand and Judge Swan in both cases *i. e.* the *Teamsters case* and the case at bar. These three judges can not be right in both cases, yet they make no mention of their previous viewpoint.

and acted as a regular union representative. Kaufman was the regular representative of a legitimate union in Newark. Circella had been appointed in a union capacity. Bioff and Browne betrayed their trust, it is true, but we have observed no intention of Congress to police the internal affairs of labor unions.

The evidence of strikes having been admitted, the Court should have taken the precaution to inform the jury that the defendants were not on trial for the damage which might have arisen through the traditional activities of labor unions.

In order to refer your Honors to some of the evidence admitted as to strikes, threatened strikes and the demands made, we submit the following references to the record. (R. 119, 120, 115, 157, 180, 166, 171, 179, 203, 204, all in Vol. I)

> The Witness Bioff: (R. 204): "We were waiting for some good sound legitimate violation by any one of the studios which would give us a good ground to start a war. * * *
>
> "We decided a new approach, since we were not getting any satisfaction from the heads of the Paramount Company here in New York, we are going to try to pressure the heads through pressuring their major circuit in Chicago."

Browne told of the manner in which he employed one Newman to watch things in Hollywood in search of a union violation. (R. 1078, Vol. II)

Here follows, in the record, a description of the manner in which a strike was called in Chicago and a conference was had between the officials of the company and the union officials. Bioff said (R. 209, Vol. I):

> The Witness Bioff: "The accomplishment was that Mr. Otterson asked me to open the theaters on a promise that he would do everything in his power to

> see to it that the IATSE retained its jurisdiction and they would correct the mistake that they made."

This was followed by a meeting in New York of which Browne reported to Bioff as follows (R. 210, Vol. I):

> The Witness Bioff: "The Report was that we were getting back all of our jurisdiction and that we will have a closed shop there too."

By this maneuver, the union acquired six or seven thousand men. (R. 211, Vol. I)

From the description given by Bioff, of the meeting between employers and employees in 1936 the jury had a right to infer and believe that Bioff was speaking in his capacity as a union leader; that when he said to Schenck "we wanted some of that money back", he meant the union and its members and officers. If such version be adopted, we submit, Congress did not intend to have the Act apply. At least, we submit, the defense was entitled to have such a defense theory passed upon by the jury, under proper instructions.

Your Honors said in *United States* v. *Local 807*, 315 U. S. 521, 527:

> "To ascertain the limits of the exception is a difficult undertaking."

Also that (p. 536):

> "The jury's task was difficult."

Your Honors, in *the Teamsters case*, figured three ways in which the facts in that case might be interpreted, and this court proceeded to construe the statute as applied to those facts. In the case at bar, further problems of construction are presented.

Your Honors said further in *the Teamsters case* (p. 530):

> "—no interference with traditional labor union activities was intended."

We again quote from the opinion in *the Teamsters case* by Mr. Justice Byrnes (p. 530):

> "It may be true that professional rackets have sometimes assumed the guise of labor unions, and, as the Circuit Court of Appeals observed, that they may have 'covered their practices by the pretense that the tribute collected was pay for services rendered.' "

We submit that it cannot be said that in the case at bar professional rackets assumed the guise of a labor union, but if the evidence could be so construed, we believe that Judge Byrnes means to imply that notwithstanding this danger, Congress intended not to interfere with traditional labor union activities, lawful and unlawful.

Judge Byrnes said further (p. 531):

> "And it may also be true that labor organizations of good repute and honest purpose can be misdirected and become agencies of blackmail."

Here is the category in which the government places the IATSE, but we submit that Judge Byrnes means to imply that with all of this in mind (p. 531):

> "Nevertheless, Congress plainly attempted to distinguish militant labor activity from the other and to afford it ample protection."

In other words we submit, Congress could not amply protect militant labor activity without giving immunity, as far as the federal government is concerned, to labor unions which might become agencies of blackmail.

Judge Byrnes said further (p. 535):

> "We have expressed our belief that Congress intended to leave unaffected the ordinary activities of labor unions. * * * The test must therefore be whether the particular activity was among or is akin to labor union activities with which Congress must be taken to have been familiar when this measure was

> enacted. * * * *It is not our province either to approve or disapprove such tactics.*" (Italics supplied)

Your Honors will permit us to observe that we do not seek to justify the activities of Bioff and Browne. They may have been within the reach of the federal government, if Congress had not seen fit to accede to labor. We do not contend that the illegal conduct shown by this record need go unpunished. Our point is, that these defendants, including Bioff and Browne, do not come under the Act, by reason of its exceptions. We again quote from Judge Byrnes (p. 536):

> "This does not mean that such activities are beyond the reach of federal legislative control. Nor does it mean that they need go unpunished. The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law."

Do your Honors think for a moment that if the evidence in *the Teamsters case* showed that some of the officials kept the money that that would have altered the situation? Suppose, for instance, that in *the Teamsters case* the union officials had collected money and turned a portion of it over to other persons, would that have changed the situation? We say no. The conduct of the officials in such case may have been reprehensible, but it would not be punishable under the Act.

Your Honors will perceive that the trial court was of the erroneous opinion that Congress intended to reach such a situation as presented here, that Congress intended to police the internal affairs of unions. We quote from the record as made on the day of sentence (R. 3842, Vol. IV, fol. 11, 526):

> The Court: "The acts of these defendants constituted a violation of an Act of Congress obviously passed to stop gangster control and activity and injury to property rights, and certainly the imputation of disgraceful conduct in union affairs. These things must not be, and if this Court can do something to prevent future transactions of this kind it would seem to be its duty to do it."

We submit that the trial court read "gangster control" and the "imputation of disgraceful conduct of union affairs" into the Act.

Congress has failed to provide for the misconduct of labor officials if they should allow outsiders to control them and has failed to provide for their misconduct of union affairs in this Act. Whether Congress should or would is another question.

In *United States* v. *McGlone*, 19 Fed. Supp. 285, the District Judge acquitted a labor representative on the evidence of the government. The judge has stated in his opinion that he read the reports of the hearings on the investigation of so-called rackets by Congress. What is set out of this in this opinion confirms our contention that Congress did not have in view the misconduct of labor men.

We have examined the briefs filed in this court on both sides in the matter of the petition of the defendants in the *Nick case* for certiorari. (Certiorari denied, 314 U. S. 687; rehearings denied, 314 U. S. 715, 316 U. S. 710.) We copy the "questions submitted" by counsel for Nick, as re-phrased by the government.

> "Whether action of labor union representatives in obtaining, by coercion, money for their own personal use in consideration for betraying the interests of the union members whom they assume to represent constitutes 'lawfully carrying out the legitimate objects'

of a labor organization within the meaning of the proviso to section 6 of the Anti-Racketeering Act."

Assuming that that is a fair question based upon the record in the *Nick case* it could not apply in the case at bar standing alone. It would not include the fact that the judge in our case refused to permit the jury to pass on this question and would ignore our main question as to whether a judge has a right to answer this question in the negative, and to hold that the jury should not hear of the exception at all.

Summary of Point Three.

The undisputed evidence showed that the acts related to the exhibition of motion pictures. The trial court regarded the exhibition of motion pictures as interstate commerce, as a matter of law, and so instructed the jury. The Circuit Court preferred to follow another circuit opinion in order to approve this error and at the same time rejected applicable decisions of this Court.

Point Three.

It was error to take from the jury the question as to whether the conspiracy was in connection with and in relation to acts affecting interstate commerce.

The Act[7] is entirely predicated upon the power of Congress to regulate and control Interstate Commerce. Here is the title:

> "*Interference with Trade and Commerce by Violence, Threats, etc.; Penalties.*"

[7] We have copied the Act in full as an appendix here (p. 3).

We quote from the Act:

> (420a) "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—"

Section 420b defines "trade or commerce," which means interstate commerce.

The indictment follows the language of the statute and charges (R. 4, Vol. I), that the conspiracy was:

> "—in connection with and in relation to acts affecting foreign and interstate trade and commerce and articles moving and about to move in such trade and commerce,—"

This allegation is at the heart of the case. The fact that this portion of the law which gave the federal court jurisdiction was in issue was called to the attention of the jury in the summation on behalf of the defense. (R. 3378, 3398, 3503, 3504, Vol. IV, fol. 10,133, 10,193, 10,508, 10,510) The pleas of not guilty put in issue every allegation of the indictment and placed upon the government the burden of proving every essential element of the offense charged. (*Prettyman* v. *United States,* 180 Fed. 30.)

The formal proof as to the production of films in Los Angeles and their distribution in interstate commerce through various exchanges, was furnished by Nicholas Schenck. (R. 1327, Vol. II, fol. 3981) The moving picture firms have been in litigation, as appears from the various court reports. (*Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Fox Film Corporation* v. *Federal Trade Commission,* 296 F. 353; *Paramount Famous Lasky* v. *United States,* 282 U. S. 30; *Youngclaus* v. *Omaha Film Board of Trade* (D.C.), 60 Fed. (2) 538; *Mutual Film Corp.* v. *Industrial Comm. of Ohio,* 236 U. S. 230; *Boynton* v. *Fox West Coast*

Theaters Corp., 60 Fed. (2) 851; *Metro-Goldwyn-Mayer Dist. Corp.* v. *Bijou Theater Co.*,59 Fed. (2) 70, all cited in *United States* v. *Interstate Circuit*, 20 Fed. Supp. 868) It may be said to be common knowledge that the producers and distributors are engaged in interstate commerce. (*Binderup case*) The error of the court, which was pointed out, in the case at bar, appears all through the case, and particularly in the charge. The trial court failed to attach any significance to the fact that the business carried on by the moving picture industry is divided into three parts, *i. e.*, production, distribution and *exhibition*. We contend that it is clear, and firmly established, that the *exhibition* of moving pictures is not interstate commerce. (*Mutual Film Corp.* v. *Ohio Indus'l Comm.*, 236 U. S. 230; *Fox Film Company* v. *Trumbull*, 7 F. 2d 715; three judge court, D. C. Conn.) It is true, of course, that interference with the *exhibition* of pictures might, in fact, stop or diminish the flow of films in interstate commerce, but such interference would be incidental. (*Schecter Poultry Corporation* v. *United States*, 295 U. S. 495)

The trial court made the mistake of solving the issue as a matter of law. The trial court held that, in view of the fact that the moving picture industry was engaged in interstate commerce, any extortion from any part of the industry was made criminal by the Anti-Racketeering Act. We submit that the trial court should have recognized the fact that films are not *moving or about to move* in interstate commerce during their *exhibition*. If the position taken by the trial court were sound, a person who obtained money on a threat that he might throw a brick through the window of an A. & P. store would come under the federal jurisdiction, as created by the Act, merely because the A. & P. Company happens, in some of its branches, to be engaged in interstate commerce.

The court explicitly took the issue from the jury as follows (R. 3722, Vol. IV, fol. 11, 166; Appendix p. 50). We quote from the charge:

> The Court: "It does not seem to me that there is any contradiction * * * that whatever was done in connection with or in relation to an act in some degree affecting interstate commerce or an article or commodity moving in such commerce. Nothing was said about it in the summation, as I remember, and I presume there is no question about it remaining in the case under the undisputed evidence."[8b]

The Court was in error in stating that nothing was said about it (interstate commerce) in the summations. (R. 3378, 3398, 3503, 3504) It would be an innovation, and error, to require counsel to either argue a legal point to the jury or be foreclosed. The trial court should have known that this issue was in fact contested by reason of the requests to charge, submitted to the court by the defense, before the trial court delivered its charge.

It is true, of course, as the trial court told the jury in the above instruction, that the evidence upon this subject is undisputed. Our point arises from the undisputed evidence, which fact makes our position unassailable.[8a]

In the case at bar the Circuit Court of Appeals said (R. 4194):

> "Nothing could more completely illustrate the unity of the whole industry; all its parts were like those of a single elastic member in which an impact upon one part is instantly (fol. 4196) transmitted everywhere. Moreover, not only would the producers feel the check upon the interstate movements of their films when the exhibitors were tied up; but, since many of the exhibitors did business on a small margin, and must have a

[8b] Please also see our appendix here where we have indicated numerous errors in the charge, including a repeated assumption that interstate commerce was involved in the exhibition of films.

[8a] Petition for Rehearing. (R. 4211)

> constant supply of films to keep going at all, a very short cessation of that supply at the sources might destroy them, and end them forever as outlets. If these were the facts, the business was interstate as matter of law, and the question should not have been submitted to the jury; and since nobody contested the facts, but only their legal effect, it was unnecessary for the judge to say anything on the issue."

The Circuit Court is mistaken in saying that the trial court found it unnecessary to say anything on the issue. The trial court said that the point should be decided in favor of the government and thereby invaded the province of the jury.

We submit that facts are in dispute when the conclusions to be drawn are in conflict. At any rate, your Honors will perceive that the Circuit Court of Appeals has decided the issue as one of law. Such decision gives us a right to be heard here because the question has been decided in conflict with the decisions of this court. *Mutual Film Corp.* v. *Industrial Comm. of Ohio*, 236 U. S. 230; *Schecter Poultry Co.* v. *United States*, 295 U. S. 495.

In *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, your Honors held that a proposition (seaworthiness) usually one of fact, was held to be a matter of law below and therefore reviewable here.

The same error as that committed below here, *i. e.*, holding that the presence of interstate commerce is a question of law, was committed by the Circuit Court of Appeals for the eighth circuit in *Nick* v. *United States*, 122 Fed. (2) 660, 673, cited in the case at bar.[9]

We quote from the *Nick case:*

> "It is not for the jury to determine what is or what

[9] It appears that the Circuit Court preferred to follow the Nick case, although it conflicts in this and in other points with the decisions of this court.

> is not interstate commerce—that is a question of law."

Your Honors will recognize the error of the Nick case on this point from the above quotation.

The defense endeavored, in vain, to prevail upon the court to submit this important issue to the jury, as appears from refused instruction No. 52, No. 53A, 53B, 20. (R. 3766, Vol. IV, fol. 11, 298; R. 3767, 3781, Vol. IV, fol. 11, 299, 11, 341; Appendix pp. 73, 74, 78) A defendant is entitled to instructions upon any theory of defense based upon the evidence[8] (*Meadows* v. *United States*, 82 F. (2) 881). An instruction which singles out and declares effect of certain facts without consideration of other modifying facts constitutes prejudicial error (*Meadows* v. *United States*, 82 F. (2) 881).

The case of *McAdams* v. *United States*, 74 F. 2d 37 (C.C.A. 8), illustrates our position. The defendant, a second hand automobile dealer, had been convicted of having received and sold cars moving in interstate commerce. The defendant requested a proper instruction which was refused. The charge of the Court took the issue from the jury and the reviewing court said (39):

> "We think it is clear that the refusal of the court below to instruct the jury that the burden was upon the government to prove that the cars in question were in interstate commerce when received and sold by the defendant was an error which entitled the defendant to a new trial."

[8] Although the law is fundamental, we refer to People v. Scalisi, 324 Ill. 131, 154 N. E. 715, merely by way of illustration. The Illinois Supreme Court held that a defendant is entitled to instructions upon any reasonable theory arising from the evidence even where the offered instruction contradicts the testimony of the defendant. Although the principle is recognized without discussion in many cases we don't find a federal case parallel to the Scalisi case. In the case at bar the defendants did not testify so the Scalisi case is not cited to fit our facts in that regard. It is a good case to demonstrate the point.

As to the error of the court in refusing a proper question of law not covered by the charge as given, see *Hersh* v. *United States,* 68 F. 2d 799, 807, and *Malaga* v. *United States,* 57 F. 2d 822, 825.

In *the Teamsters case,* the defendants were convicted not only under the Anti-Racketeering Act but under the Sherman Act. The Circuit Court of Appeals reversed that conviction insofar as the Sherman Act is concerned, under the authority of *Apex Hosiery Company* v. *Leader,* 310 U. S. 469. The prosecutor, in the case at bar, profited by that experience to the extent that he did not include the Sherman Act in the indictment here. Still there is much of value to be found in the *Apex case* from which we quote (p. 489):

> "While we must regard the question whether labor unions are to some extent and in some circumstances subject to the (Sherman) Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce."

After reviewing the cases, this court said in the *Apex case* (p. 513):

> "If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."

We submit that if the trial judge is correct in the case at bar, every local strike in the moving picture industry would be brought within the jurisdiction of the federal courts.

We quote[10] from 15 *Corpus Juris Secundum,* COMMERCE p. 281, section 18, citing *Foster & Kleiser Co.* v. *Special Site Sign Co.,* 85 F. (2) 742 (C.C.A. 9):

> "The fact that a business having aspects of both interstate and intra-state operations is conducted by a single corporation does not make the entire business either interstate commerce or intra-state commerce, but its character is determined by the particular transactions involved."

We submit that in the case at bar the prosecutor and the trial court both lost sight of the fact that the *exhibition* of pictures is a local business.

In *Pennsylvania Company* v. *Donat,* 239 U. S. 50, in an action based an the Employers' Liability Act your Honors held that the trial court properly submitted to the jury for its determination whether, on the facts shown in regard to movement of cars coming from without the State, the plaintiff was or was not engaged in interstate commerce. This action of the trial court had been approved by the Circuit Court of Appeals. The only ground upon which the railroad asserted error in this Court was that the trial court erred in refusing to charge that the plaintiff was not engaged in interstate commerce. The trial court did not err. This court held that the point was so frivolous as to not need argument and affirmed the judgment on motion. In the case at bar, the trial court did exactly what the trial court refused to do on behalf of the railroad in the *Donat case.*

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[10] We feel that we should apologize for belaboring a point on which your Honors are experts. It seems so clear and simple to us, yet if we are not entirely mistaken, two courts below have failed to understand the merest fundamentals.

As this court said in *Schechter Corp.* v. *United States*, 295 U. S. 495, 546:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. *Minnesota Rate cases*, 230 U. S. 352."

The question of whether the films were moving in interstate commerce became involved in the *Nick case*. When the convicted defendants applied here for certiorari, the government rephrased the "question submitted" and asked:

> "Whether money obtained from motion picture exhibitors under threat of calling a strike which would interrupt the interstate flow of films to these exhibitors is money obtained 'in connection with any act affecting (interstate) trade of commerce' within meaning of section 2 of the Anti-Racketeering Act?"

This question assumed that the films were "in flow" and the facts in the *Nick case* appear to support the theory of the government. Nick and Weston conducted a sound service which burdened the flow of films to and from the exchanges and over state lines. In the case at bar the defendants were deprived of consideration of the fact that the films had come to rest and were mingled with State property. That a strike might incidentally affect the movement of films. If the same question, as above quoted, were offered here by the government, we would suggest that "the flow of films" be not assumed. Also that there be included the fact that the judge employed the literal meaning of the words of the Act as to "acts affecting commerce" and took the question from the jury.

Summary of Point Four.

The courts below applied the literal meaning of the Act to make it apply to the exhibition of motion pictures and in such manner as to make the Act govern every state activity. Congress did not intend any such construction and if Congress did so intend, the Act is unconstitutional. Here too the Circuit Court rejected applicable decisions of this court and gave preference to a decision in another circuit.

Point Four.

Construction given below to scope of Act renders it unconstitutional.

We submit that if the Act is to be construed in the manner adopted by the trial court and the Circuit Court of Appeals, it is unconstitutional and not within the power of Congress. We have already quoted from the opinion (R. 4194) of the Circuit Court where that court compares the movie industry to "a single elastic member."

If such a decision is to stand, and should be followed in New York and elsewhere, every strike is within federal control. This conflicts with the decision of this court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

We conclude, from the charge and from the entire theory of the trial below, that the court and the prosecutor must have abided by the letter of the statute which makes the acts thereby prohibited federal offenses if done—

> * * * "in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in interstate commerce."

The Circuit Court of Appeals, in the case at bar, approved of the action of the trial court without mention of our claim that such a construction renders the Act unconstitutional. In *United States* v. *Gramlich*, 19 F. Supp. 422, 424 (D. C. Ill.), the constitutionality of the Act was attacked on this ground. Counsel for the government asked the court to disregard the broad language of the Act in order to save its constitutionality. The court overruled the demurrer because the indictment averred a *substantial* and *material* interference with interstate commerce. In the case at bar the indictment is as broad as the statute. The indictment assumes that the *exhibition* of motion pictures is interstate commerce.

We do not suppose for a moment that your Honors are going to enforce the literal meaning of the Act. There are limitations upon the power of the federal government. The greatest exertion of power is allowed in the regulation of commerce as such. This court has often said that the Congress has not seen fit to police interstate commerce. (*Apex case*) The police power of the states in the control of crimes of violence is not to be infringed upon by Congress. The power to deal with force and violence is expressly guaranteed to the states, the federal government is expressly prohibited from invading this power. We don't believe Congress intended to exceed its power.

Summary of Point Five.

The trial court allowed the victims to tell what they feared and why they paid the money. This state of mind testimony was given years after the event and included what the victims had heard of the defendants since it was discovered that they were in the picture, and included hearsay evidence as to property damage, bombings, murders which had been caused in the past during strikes, strikes with which the defendants were not even thought to have been connected. The Circuit judge who wrote the opinion thought that this was error but to him it seemed harmless and did not prejudice the defendants. The other two judges thought that there was no error. All three judges ignored an applicable decision to the contrary in this court.

Point Five.

The state of mind of the victims.

This point arose first in the direct examination of the witness Jacocks (R. 960), sole manager in charge of theaters operated by Warner Brothers in New Jersey. The witness was asked why he paid Bioff. Objections were made (R. 960, Vol. II, fol. 2879), and after argument, the court permitted the answer, *i. e.*, that Jacocks was afraid that their theaters would be closed.

This point arose next in the direct examination of Nicholas Schenck (R. 1337, 1355, Vol. II, fol. 4063):

> The Witness Schenck: "The reason I made the two payments is, as I explained before, because we had to pay it or destroy our business." * * *

Upon re-direct examination of Schenck, the prosecutor developed that Schenck had consulted lawyers and could

not obtain a labor injunction because of the Wagner Act. (R. 1466, Vol. II, fol. 4397) The witness was then asked again what he had in his mind when he paid. After an objection was overruled, he told of difficulties in New York in 1935. Schenck said that pictures were run upside down and out of order, the lights had gone out, that they experienced all kinds of trouble with stink bombs and other things. Then there appears the following (R. 1467, Vol. II, fol. 4401):

> The Witness Schenck: A. * * * the whole thing was so alarming to me, and knowing that after all that not only is it money, meaning that it would destroy our business, but it involved the safety of people that go to the theaters. * * * I had in mind the consequences of a strike, the possibilities of the damage that would be done, the possibilities of human life. * * * In one of our theaters, your Honor, we found a bomb under the roof of the theater, that holds about between 3,800 and 4,000 seats. We were never able to find out who put it there."

We submit that it was prejudicial error to permit proof of the state of mind of this witness, and the court erred in refusing (R. 1467, Vol. II, fol. 4400) to strike out the improper evidence as to what Schenck had in his mind when he testified that he was thinking of the safety of the people who go to theaters.

During the direct examination of Albert Warner for the government, the witness answered as to what he had on his mind, he said that he knew that these people

"had a murder or two to their credit,"

that the business, being a cash business, would go bankrupt if the wheels should stop rolling for a matter of days. (R. 1556, 1557, Vol. II, fol. 4671):

> The Witness Albert Warner: "The harm they could do both to the physical property of the company and

> me personally. * * * That was in my mind, and knowing the record of these people, a murder or two to their credit."

After another objection was overruled, specifically pointing out that it was error to permit a witness to tell what was on his mind and to permit him to give a panorama of business conditions and other things, and to express now that that was on his mind, and to relate his fear of strikes (R. 1558) there appears the following during the direct examination of the witness Harry Warner (R. 1660, Vol. II, fol. 4978):

> The Witness Harry Warner: A. "I felt that the man (Bioff) had the power to close up the business and cause you bodily harm, whichever one or maybe both, and those two things combined persuaded me that I had better give it to him."

We quote further from the record, as made during the direct testimony given by the witness Coston (R. 1728, 1799, 1801, Vol. II, fol. 5183):

> A. The only way I could keep the theaters operating, * * * was to pay this man (Bioff), otherwise we would have had strikes.

Here again, we submit, the trial court indicated very clearly that it was of the opinion that a state of mind, or thought, that strikes might be called and that the witness feared such an event, was proper as evidence.

The prosecutor took advantage of this erroneous ruling to call for experiences and hearsay evidence of violence and damage. We submit that the entire proceeding was improper and harmful. All of this improper evidence can be boiled down to the fear had by the employers of the power which might be exercised by a union, if the union should choose to resort to primitive methods. Although now and then the court did strike some of the

matters after they were volunteered it is apparent that the witnesses thought it was proper to tell what they had heard of some of your petitioners since the exposure by Bioff.

We refer your Honors to the record as made upon the re-direct examination of Coston (R. 1799, 1801, Vol. II, fol. 5397):

> The Witness Coston: A. "We had some experience in the years past, especially in 1931, or the strike of the independent theaters, where they were operating with one man and the union would not consent to let them operate with one man and two or three people were killed, some operators, and people withdrawn. * * * Bombs were thrown in the theaters, considerable damage was caused to the theaters, and my own men, in 1935 and 1936, after the death of—* * *"

Here again, under the guise of proving a state of mind, which of itself is improper, the prosecutor prejudiced the defendants with hearsay evidence of murders, bombings and damage, inflicted long before it is claimed that these defendants were involved. The prosecutor made full use of the improper evidence in his appeal to prejudice, in his summation. (R. 3665, 3642, 3643, Vol. IV, fol. 10, 993, 10, 925):

The errors complained of under this head appear also in the direct examination of the witness Keough (R. 1825, Vol. II, fol. 5473) who said that he feared personal harm. We submit that it was improper for the court and the prosecutor to develop from the witness his fear of personal harm, especially in view of the lack of any such charge in the indictment.

The same erroneous rulings appear during the direct examination of the witness Barger (R. 2152, Vol. III, fol. 6455) who said he was afraid of his business. In view of the fact that the Barger deal was entirely foreign to the issues, this error was especially prejudicial.

The error of the court in the case at bar appears from a reading of *United States* v. *Local 807*, 315 U. S. 521, from which we quote (532):

> "If the objective that these defendants sought to attain by the use of force and threats is not the objective to which the exception in Sec. 2 (a) affords immunity, they are guilty and nothing further need be shown concerning the actual motive of the owners in handing over the money. On the other hand, if their objective did enjoy the protection of that exception, they are innocent and their innocence is not affected by the state of mind of the owners."

Thus *the Teamsters case* settled in no unmistakable terms that the state of mind of the victims is immaterial. It is difficult to understand why the law should not have been followed here in the court below, especially when it is remembered that *the Teamsters case* arose in New York. There is nothing which could bring the courts into disrepute quicker than to allow the impression that they decide the law one way in one case and the opposite in another because of the persons involved. One would think that the Circuit Court would have been glad to explain just what prompted them to regard this case differently than they did the *Teamsters case*. We were entitled to a fair discussion which would be expected to include their views in regard to the law of the *Teamsters case*, as applicable here. Or if they believed that the *Teamsters case* did not apply they should have said so.

In the case at bar, the error is further emphasized by the fact that the court took from the jury the question as to whether the exception in the statute applied. The court improperly decided, as a matter of law, that the requisite intent was present and at the same time allowed the jury to hear improper evidence on the issue of intent, *i.e.*, the state of mind of the victims. We submit, that in every case

where employers hand money over, or accede to any demand made by a union labor official, the victim has fear of the power of the union. Congress intended to not interfere with this power as traditionally used, even where primitive methods are employed or threatened. It must be apparent that the trial court here improperly permitted the government to show the motive of the owners in handing over the money.

Even if the court had been correct in its ruling, the court should have recognized that the evidence was admitted for only a limited purpose. The court should have prevented the prosecutor from making use of this immaterial evidence in an appeal to prejudice as appears from his summation. (R. 3642, Vol. IV, fol. 10, 924) *Pierce* v. *United States*, 86 F. 2d 949, 953; *Read* v. *United States*, 42 F. 2d 636, 645:

As was said by Mr. Justice Byrnes in *the Teamsters case*:

> "Under them (the instructions) the jury was free to return a verdict of guilty if it found that the motive of the owners in making the payments was to prevent further damage and injury rather than to secure the services of the defendants. Whether or not the defendants were guilty of conspiracy thus became contingent upon the purpose of others and not upon their own aims and objectives."

We trust that after a full consideration of the case at bar, your Honors will say, as was said by Mr. Justice Byrnes (p. 539):

> "Since the instructions denied, and the misleading instructions actually given, go to what is indeed the heart of the case, we hold that the convictions cannot stand," * * *

The defense endeavored to limit the evidence as to violence in general by an instruction which the court refused (R. 3775, Vol. IV, fol. 11,324).

Greater New York Live Poultry C. of C. v. *United States*, 47 F. 2d 156 relied upon by the prosecutor in the trial court (R. 961, Vol. II, fol. 2881), but not cited by the Circuit Court of Appeals, can be distinguished. The state of mind of the receivers was in issue. The receivers were in the conspiracy as actors. When they refused to sell to recalcitrant marketmen their refusal might be innocent or guilty according to their intention. Their intention and their state of mind as expressed at the time of the transactions constituted verbal acts.

In the case at bar the victims were not actors in the conspiracy—their state of mind or intention was material, but was not the subject of opinion evidence. It was for the jury to decide whether the payments were induced because of fear. The jury should have been left to decide from what was said and done and all of the surrounding circumstances why the money was paid. The Court permitted the witnesses to invade the province of the jury, the witnesses decided an ultimate fact in issue.

We quote from the opinion of the Circuit Court of Appeals in the case at bar (R. 4198, fol. 4200; Appendix p. 104):

> "But although I (Judge Hand) think that it was error to admit the testimony, I do not believe it requires us to reverse the convictions. It might have done so, if the victims had based their fears upon what accused had done in the past; but the testimony did not in this way covertly convey to the jury an accusation of earlier and independent crimes."

Here we submit that Judge Hand must have failed to perceive the record from which we quote (R. 1556, Vol. II, fol. 4671):

> "The Witness Albert Warner: The harm they could do both to the physical property of the company and me personally. * * * That was in my mind, and knowing the record of these people, a murder or two to their credit."

The improper reference to these defendants as bad men generally, was by no means "covertly" conveyed.[11] Nothing could possibly be more damaging.

Judge Hand said further (R. 4198; Appendix p. 105):

> "Indeed, it did not appear that any of the accused on trial had ever called a strike in the past."

Your Honors will see the fallacy of this statement: "The accused on trial" acted through Bioff. Judge Hand substituted terms. This is illogical. The "accused on trial" collected no money.

Judge Hand said further (R. 4198; Appendix p. 103):

> "What they told Bioff of their reasons for paying him was of course relevant—"

Your Honors will perceive from the record that the victims told Bioff nothing.[12] Bioff did the talking. The illegal state of mind testimony was in fact what the government witnesses thought four years after the event.

As to the view held by Justices Swan and Clark in the case at bar, the opinion states (R. 4197, fol. 4199; Appendix p. 100):

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[11] This mistake upon the part of the Circuit Court was called to their attention to no avial in our Petition for Rehearing (R. 4208, Point One).

[12] This mistake was also pointed out in our Petition for Rehearing (R. 4208, Point One).

> "They (the victims) would know why they paid the money, and, the issue once open, no prosecutor should be limited to the bare statement that the threat had been the motive; the victim would be allowed to show in detail just what fears the threat aroused in him."

It not only escaped all of the judges below that this is the rankest hearsay, but all of the judges seem to have overlooked the undisputed fact that the witnesses were permitted to invade the province of the jury. They failed to notice that the existence of fear and what may have caused the fear were ultimate facts for the jury.

Judge Hand said (fol. 4200), that it is difficult to learn from the *Nick case*. We submit that the Circuit Court of Appeals failed to perceive that the *Nick case* should be given no weight at all as authority. The opinion in *the Teamsters case* (315 U. S. 521) is not only of a higher court but it is also more recent than that of *the Nick case*. We submit that *the Nick case* is clearly wrong as to the points involved in the case at bar.

Summary of Point Six.

Barger ran a burlesque house in Chicago. He was falsely designated as unknown to the grand jurors. Bioff forced a partnership upon Barger which originated with Barger's desire to stifle competition. D'Andrea was paid a salary by check although he did not work at the theater. The theory of the government was that this was paid pursuant to the conspiracy charged. The defense claimed that this was money paid for protection as against local police. In any event, it all had no connection with interstate commerce further than the fact that Barger exhibited motion pictures. The Circuit Court adopted a rule

which would put the corner policeman into a national conspiracy to halt interstate commerce, upon receipt of bribe money from Barger, if the policeman agreed that Barger be not arrested for an indecent show. Provided that the burlesque show was sandwiched in with a motion picture.

Point Six.

Evidence of money illegally obtained from a local burlesque theater.

This was referred to as the Barger deal and is complained of (R. 2114, 2121, 2126, 2127, 2131, 2134-2135, 2152) as immaterial and highly prejudicial. The admission of this transaction illustrates a wrong conception of interstate commerce, and the failure to recognize any limit upon the jurisdiction of the federal courts under the Anti-Racketeering Act. There can be no question as to the position taken by the prosecutor. In his argument he said, (R. 3630):

> "The victims are in effect every component in the moving picture business, and that includes Barger."

This improper evidence furnished the only alleged connection of D'Andrea with the conspiracy alleged.[13] The remaining scraps of evidence against D'Andrea are insignificant. Numerous payments were made by check by Barger to D'Andrea within three years of trial, so this improper evidence formed an important link as against all of the defendants.

Bioff (R. 295) and Browne (R. 1146) testified to their relations with the burlesque houses. The story can be found in the testimony given by Barger. (R. 2110) Your Honors will note that numerous objections, based upon

[13] Your Honors will notice that the jury requested a repetition of this evidence after retirement. (R. 3744, Vol. IV, fol. 11,231)

the ground that this evidence was irrelevant were overruled by the court (R. 299) and exceptions were taken. Barger was not named as a victim in the indictment (R. 5), although he had been before the grand jury. (R. 2110) He does not come within the description or class of persons named as victims in the indictment. Barger testified to a local matter having no tendency to establish the conspiracy charged.

The Court should have held that Barger was not engaged in interstate commerce, and that if his theater were closed and the exhibition of motion pictures stopped, the effect on interstate commerce would have been incidental, infinitesimal, and not related to interstate commerce. (*Fox Film Corporation* v. *Trumbull*, 7 F. 2d 715) Anyone should be willing to recognize the fact that the jury should have been left free to conclude from the evidence that this was a local matter. Instead the judge put Barger into this case as a victim without qualification.

The Circuit Court of Appeals said on this point (R. 4194, fol. 4195):

> "They (Maritote and D'Andrea) could not have supposed that they were bona fide employees of Barger; nor is it tenable to assume that a ruthless grasping crew of blackmailers would provide soft births for subordinates who were ignorant of the general nature of the undertaking of which they were beneficiaries."

We trust that your Honors will see the fallacies contained in the above quoted phrases. An understanding of our case would reveal that the fact that D'Andrea was not a bona fide employee of Barger was of no importance. The defense urged at the trial on behalf of D'Andrea didn't suggest for a moment that he was a bona fide employee. He never supposed that he was, and the Circuit Court of Appeals seemed to have in some way thought that that was an issue.

The Circuit Court of Appeals assumed that D'Andrea was a subordinate as to this matter, and that obtaining money by him from Barger imports a knowledge of the guilt of Browne and Bioff as to the federal charge. The Circuit Court failed to understand that D'Andrea may have been a subordinate of some one else, as to a local activity having nothing to do with the case at bar. The Circuit Court of Appeals disregarded the fact that the supposed purpose of the trial below was to try the charge made in the indictment and to keep within federal jurisdiction.

We are not requesting that your Honors weigh evidence or review conflicts. The Barger deal was not proper under the government theory and after conceding the truth of every word Barger uttered. Of course we can not concede that Barger was engaged in interstate commerce.

Summary of Point Seven.

The trial court told the jury that there could be no defense for your petitioners under the Statute of Limitations if anybody, including the accomplice witnesses, did anything within three years, no matter whether the statute had already run as to your petitioners or not. The Circuit Court approved.

Point Seven.

The statute of limitations.

The court eliminated the statute of limitations. We quote from the charge (R. 3733, Vol. IV, fol. 11,199):

> The Court: "If, on the contrary, however, you find that the conspiracy continued after March 18, 1940, and acts were done or proceedings were had which were contemplated by the conspiracy as originally entered into, then the defendants would have no defense under this statute."

Under the law, as announced in the above instruction, no defendant could avail himself of the statute of limitations if other persons performed acts within three years. Acts were performed by Bioff almost up to the date of the return of the indictment.

The above portion of the charge is reprinted in bold face type on p. 64 of our appendix. We have selected only one small portion of the charge of which we complain. Please see other portions also set out in bold face type in our appendix pp. 61, 62, 63, 64, 65. The general effect of the charge must have been to destroy the defense. The jury asked for its repetition after they retired. (R. 3744, Vol. IV)

The defense offered a correct rule of law in Nos. 72 and 73 which we submit was erroneously refused. (R. 3774, Vol. IV, fol. 11, 320; Appendix p. 76) (*Ware* v. *U. S.*, 154 Fed. 577.)

Other portions of the charge also nullified the defense. (R. 3731, Vol. IV, fol. 11,192; R. 3732, 33) We submit that the trial Court had no right to tell the jury that the relation of the conspirators *must* continue, or that once he joins he would remain.

In *Buhler* v. *United States*, 33 F. 2d 382, 384 (C.C.A. 9), the court noted that:

> "The government does not contend that appellant devised or participated in devising the scheme in question, or in its inception had anything to do with or knew anything about it."

In the case at bar the government claims that some of the minor characters joined after the conspiracy was formed.

In reviewing the authorities, the Circuit Court of Appeals for the Ninth Circuit, in the *Buhler case*, said (384):

> "The formation of a criminal conspiracy or adherence to a criminal scheme may be shown by evidence either direct or circumstantial, in practice often taking a wide range, and we see no reason why the withdrawal should not be held susceptible to proof of the same character."

The instruction given by the court (R. 3733) is consistent with the charge to the jury, to the effect that any act done by any one binds all defendants.

Your Honors will notice that the trial judge commented on the facts with reference to the Statute of Limitations (R. 3733, Vol. IV; Appendix p. 65).

Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations.

The same rules of law and evidence govern the trial and decision of the issue whether or not a defendant jointly with others consented or agreed to the existence of a former conspiracy within the three years and the subsequent execution of it, which control the issue whether or not the conspiracy was originally formed, where that is the crucial issue. (*Ware* v. *United States*, 154 Fed. 577.)

We quote from *Boatright* v. *United States*, 105 F. 2d 737, 739:

> "If the testimony is summed up or analyzed, care must be taken to sum up and analyze both sides, and the judge must not become an advocate."

We quote from the remarks of the trial Court on the day of sentence (R. 3842, Vol. IV):

The Court: "Whether or not the conspiracy ended

more than three years before the indictment, in which question was also included whether three of the defendants had withdrawn from it before the three-year period. That also was a question of fact and was submitted as such. The evidence, in my opinion, amply sustained the verdict."

We complain here that the question was not properly submitted as a question of fact.[14]

We quote from the opinion of the Circuit Court of Appeals in the case at bar (R. 4195):

> "The indictment having been filed on March 18, 1943, it was necessary to show that it continued until March 18, 1940, and there was evidence in plenty that it did, although several of the accused were not shown to have continued their connection with it as late as that. To meet this lapse in the evidence as to them, the prosecution invoked the well established doctrine that anyone, once shown to have been a member of a conspiracy which lasts until the beginning of the statutory period, must satisfy the jury by affirmative proof that he disconnected himself from it before that period began. So the judge charged, and he was quite right; we have so lately affirmed such a ruling, that we need only refer to the authorities on which we then relied. *United States* v. *Cohen*, 145 Fed. (2), 82, 90."

We submit here that our points were not answered by the Circuit Court of Appeals. The trial judge was not "quite right." There is nothing in *United States* v. *Cohen*, 145 Fed. (2) 82, to support the instructions given in the case at bar. Here the judge assumed that the conspiracy was a continuing one. An understanding of our complaint requires a study of the entire charge. The jury requested it after they had retired, on the statute of limitations. (R. 3744) Of course government counsel has a right to submit

[14] Please see the appendix where we have copied the charge and commented upon this.

forms and suggestions to the court but the court shouldn't incorporate the argument of the prosecutor into the charge as he did here when he recited the facts as claimed by the government and said (R. 3734; Appendix p. 65):

> "and some other matters to which the government counsel called your attention during his summation."

Summary of Point Eight.

The judge told the jury, in his charge, that he had to be careful because all was being taken down and if he made any mistakes they could be reviewed upon an appeal, and in such event the case might come back for another trial. Naturally the jury understood that a conviction would not be permitted to stand by the Circuit Court if the judge turned out to be wrong. The judge was in error but the Circuit Court did nothing.

Point Eight.

Explaining to the jury that the defendants had a right to review.

It is submitted that the trial Court committed reversible error in telling the jury of the right to review. (R. 3712, Vol. IV, fol. 11,136)

When counsel objected, after the charge was completed, the court attempted to withdraw this charge, but we submit that the error was not cured.[15] It was improper and prejudicial for the court to make reference to the right of review.

[15] The Circuit Court ignored the error. If that court had said that the error was cured by the subsequent action of the trial court we could still argue that that would be like pulling a nail out of a board without expecting a mark. The judge could not very well retract by saying that he had been wrong and there is no appeal. All he could have said would have been to tell the jury that they should not have been told of the appeal. To tell them to disregard any such instruction is just futile.

Also see *Cleveland Ry. Co.* v. *Locke*, 26 Ind. App. 269, 123 N. E. 816.

In *McDonald* v. *People*, 126 Ill. 150, 153, 18 N. E. 817, it was held to be error for the prosecutor to refer to the right of an appeal. We quote (154):

> "In *State* v. *Kring*, 64 Mo. 591, 595, where the jury were told, in the argument, that if they wronged the defendant by finding him guilty, that wrong can be righted by an appeal by the defendant to the Supreme Court, the remark was held to be error. It is there said: 'The statements that the higher court referred to had the power to review the finding of the jury on the weight of evidence, was calculated to induce the jury to disregard their responsibility.'"

This point is not mentioned in the opinion of the Circuit Court of Appeals.

No summary of the misconduct of the prosecutor is possible.

This point cannot be summarized, to our satisfaction, for the reason that it is necessary to understand the entire record in support of our charge that the prosecutor never had any intention of conforming to the rules which should govern a civilized trial.

Every possible device was resorted to in order to slur and prejudice the defendants. The following is a partial list of the instances of which we complain.

The prosecutor said, in substance, that theater owners are vulnerable to acts of vandalism and violence because anybody, by payment of admission, can walk into a darkened theater. Damage to theater property means injury to the public. (R. 3642)

In his argument, he referred to the testimony of Coston and dwelt upon murders, bomb throwing and damage to theaters in 1931. (R. 3665)

The prosecutor testified in his argument that he had been to Chicago and had observed the operation of theaters. (R. 3643)

In his argument, he criticised the basis used by the union in arriving at a wage scale. (R. 3643)

He condemned any defense which the statute of limitations might afford by summarizing it to the effect that the criminal says you have caught me too late. (R. 3632)

After the court had stricken evidence as to a conversation between an attorney, Korshak, and Bioff because the prosecutor had failed to connect the defendants, the prosecutor proceeded to base an appeal to prejudice upon this testimony which had been stricken. He told the jury that these defendants instructed Bioff to perjure himself in his trial. (R. 3700)

After the court ruled that the evidence of a deposit made by union officials to the credit of a baby born to Mrs. DeLucia (R. 314) was immaterial, and the prosecutor prevailed upon the court to admit the evidence for a limited purpose—to show control of the union, then he made use of the evidence in an appeal to prejudice. (R. 3702)

The prosecutor argued that Bioff was convicted of pandering while in the employ of D'Andrea, thereby implying that D'Andrea was in a reprehensible business. Also that D'Andrea assisted Bioff in making false representations to an insurance company. (R. 3637, 3685)

He argued, without any basis in the evidence, that some of the defendants were muscle men delegated to the convention to make sure that everything went right. (R. 3639)

The prosecutor inferred without any evidence, that some of these defendants threatened the life of Sherman. (R. 3640)

He said that the convention hall was policed by some of these defendants without any proof. (R. 3641)

The prosecutor appealed to prejudice by an argument based upon the relationship between Sherman and one Lepke, having no connection with these defendants. (R. 3640)

The prosecutor made reference to Al Capone and assassination having nothing to do with this case. (R. 3664)

The prosecutor appealed to prejudice by an unwarranted argument to the effect that this mob decided to kidnap the Actors' Union, and to give it to one of the defendants to play with. (R. 3682, 3700)

The prosecutor unjustly and with no evidence at all accused Rosselli of shaking down Casey. (R. 3695)

The prosecutor appealed to prejudice as against Rosselli because he happened to have been a guest in the home of Capone, while Capone was in the penitentiary. (R. 3693)

The prosecutor placed McLane upon the stand knowing that McLane had no information material here, merely in order that the prosecutor might argue that McLane was afraid to testify. (R. 3618)

The prosecutor requested the jury to convict these defendants in order that he might secure some of them at a future trial as witnesses. (R. 3710)

In an appendix we have copied a number of excerpts from the argument of the prosecutor to show that he recognized no restraint (pp. 11 to 35).

Point Nine.

The argument of the prosecutor.

We quote from the summation as made by the prosecutor (R. 3716, Vol. IV; Appendix p. 33):

> Mr. Kostelanetz: "Personally, I hope this is not the end of a long road for me, which has extended some four years now, when this case really started.
>
> Without the conviction of Bioff and Browne and Circella these defendants would never be on trial before you, and I look forward to the day when, with your assistance, or I should say when your verdict will make it possible, a situation when one of these defendants will sit on the witness stand just like Bioff and Browne did—
>
> Mr. Eben: I object. That is obviously an improper argument, and I ask that counsel be cautioned with reference to it.
>
> Mr. Kostelanetz: I did not finish my sentence.
>
> Mr. Simandl: This is the second time this same argument is being made, and I say to the Court the first time I let it go by in the interest of what I might say was trying to keep calm. I think it is a deliberate unfair argument.
>
> The Court: I think we might better confine our argument to the present and let the future take care of itself.
>
> Mr. Kostelanetz: Well, I will do that, your Honor. I was just stating my views in the situation."[16]

We submit that the comment made by the court was an endorsement of the improper argument. (*Volkmor* v. *United States*, 13 F. 2d 594.) Your Honors know the prosecutor has no right to seek convictions upon the basis stated. He might very well ensnare innocent men, because the jury is led to believe that a minor character may, in the future,

[16] Please see the appendix here where we have quoted many other instances of improper argument.

become a witness for the government. (R. 3658, Vol. IV, fol. 10,973)

In speaking of the misconduct of the prosecutor in *Berger* v. *United States*, 295 U. S. 78, 85, this Court said:

> "It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct."

We claim the same thing in the case at bar. In many instances, not specifically pointed out by us because of their number, the misconduct was subtle and calculated to have the appearance of being within the rules. We have pointed out some of the misconduct where it is evident that there was no intention to comply with the rules.

We submit that the following, which we also quote from the *Berger case*, is applicable to the case at bar (89):

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The *Berger case* was affirmed in the Circuit Court of Appeals (73 F. 2d 278) where it was held in an opinion written by Judge Learned Hand that the conduct of the prosecuting attorney, although to be condemned, was not sufficiently grave to affect the fairness of the trial. Sometimes the most difficult task confronting a lawyer on appeal is to convince the upper court of the harm done below. We submit that under the circumstances of the case at bar, prejudice to the cause of the accused is certain.

In *United States* v. *Sprengel*, 103 F. 2d 876, after stating that (879):

> "In our opinion there can be no question of the guilt of the appellants. What we must decide is simply whether or not the appellants were granted such a trial in substance and form as the law requires."

The Circuit Court of Appeals said (P. 884):

> "These comments concerning what might constitute the future conduct of the appellants were prejudicial. The appellants were on trial for crimes which they committed, not for a course of future conduct."

The Circuit Court of Appeals in the case at bar said (R. 4201):

> "The supposed excesses of the prosecutor in his summing up to the jury, we have already dealt with upon an application for bail; we then said, and we now repeat; that he did not go beyond 'permissible limits.'"

If such excesses are permissible there is no limit, everything the prosecutor might do or say is "permissible."

If Judge Learned Hand is correct in his views as to what does not constitute reversible error, the right of appeal is an empty formality. Judge Hand said, in *United States* v. *Berger*, 73 Fed. (2) 278, that the responsibility for the result of a trial must rest upon the trial judge and that:

> "mere possibilities do not interest us as they did our forerunners, we demand more tangible evidence that damage has been done."

Your Honors will not blame us if we think that the extreme demands there made are one of the reasons the government chose New York as the forum in our case. The prosecutor is there encouraged to disregard the rights of a

defendant, he is likely to conclude from their opinions that if the Circuit Court for the Second Circuit thinks a defendant is guilty, nothing matters. He is apt to believe that the end justifies the means.

We contend that a study of the opinions rendered in the second circuit will reveal that some of the judges there persist in regarding errors harmless by authority of Section 391, Title 28, U.S.C., because of a failure to appreciate the real intent of Congress.

Please see the dissenting opinion in *United States* v. *Lisa*, 137 Fed. (2) 995 (C.C.A. 2), where Judge Frank has collected the authorities in support of his assertion that his colleagues have failed in this regard. Judge Frank has also written of the duty that court should recognize to the public in a statement of the reasons which impel the court to decide the questions submitted.

The prosecutor even claimed in his argument that the jury should not regard any weakness in his proof in favor of the defense. He argued that the government was helpless because the proof could not be obtained against such as these defendants.

After the judge erroneously gave the prosecutor more latitude than deserved in the introduction of evidence, he employed a number of methods to convey his accusation in those rare instances where the judge ruled against him. He resorted to statements based upon his own knowledge. He argued that facts were proved when he had absolutely no evidence upon which to base his claim. He dragged into the case notorious characters by a mention in a question and claimed that they were associated with the defendants; without foundation in the record he accused the defendants of kidnapping, of shaking down others. His argument was an appeal to passion and prejudice from

start to finish. The record shows it did the defense no good to object for the reason that the prosecutor would make matters worse by persisting in his point even after an objection was sustained. Then too, the judge indicated rather plainly that this illegal argument had the approval of the court. The defendants were helpless. The situation here was even worse than that denounced by your Honors in *Berger* v. *United States*, 295 U. S. 78. Berger was charged with a crime relating to bank notes. These defendants were charged with a crime which the prosecutor enlarged into the general charge that they were gangsters.[17] Even if the legitimate evidence entitled the prosecutor to make the claim and assert that they were such, he should have been held within proper bounds and his overstepping them made the injury irreparable. In *Ippolito* v. *United States*, 108 F. (2) 668, 670 (C.C.A. 6) the trial court admonished the prosecutor for calling the defendants names. The action of the court was not enough to remove the injury. In the case at bar the trial court did nothing to protect the defendants. Courts of review have often, as in *Pierce* v. *United States*, 86 F. (2) 949, 952, spoken of the knowledge gained by those of experience in the trial of criminal cases as to the effect of misconduct on the part of the prosecutor. In the *Pierce case* the Circuit Court was able to see from the record that the prosecutor made a studied effort to inject into the case irrelevant and prejudicial matter for the purpose of influencing the verdict. The insidious design of the prosecutor in the case at bar should be all too plain to anyone with the slightest experience. We are not here concerned with improper argument and conduct springing from the heat and enthusiasm of advocacy. The case consumed eleven weeks. The studied plan of the prosecutor continued

[17] The judge told the jury in his charge that the Act was intended to eliminate professional gangsters (R. 3721).

in operation from start to finish. No doubt he was convinced that the end justified the means. The cumulative effect upon the jury cannot be disregarded as inconsequential.

McLane (R. 2320, Vol. III) was president of the bartenders' union in Chicago. If he had testified fully and freely, it could have been made to appear that possibly that he claimed at one time that some of the defendants committed illegal acts as against him. We don't suppose the prosecutor will claim that bartenders are engaged in interstate commerce or had anything to do with moving pictures. There is nothing in the indictment which could suggest the materiality of anything McLane might have to say. McLane took the stand and refused to identify any of the defendants. The prosecutor called McLane for only one purpose, and that was to prove that McLane was afraid to testify. See *Putnam* v. *United States,* 162 U. S. 687; *United States* v. *Biener,* 52 F. Supp. 54.

Summary of Point Ten.

After the jury had been out and had sent notes to the judge indicating an inability to agree and a failure to remember certain testimony, the judge, according to his own statement, stopped in the jury room. The Circuit Court designated this as a mere "informality" and concluded, without foundation, that no harm was done. In another circuit it has been held that where the record fails affirmatively (as here) to disclose that no prejudice did result, the verdict cannot stand.

Point Ten.

Communication with the jury after retirement.

The record (R. 3744, Vol. IV, fol. 11,231), shows that the jury retired at 11:55 A. M. and at 12:50 P. M. the following occurred:

(Italics supplied)

> "The Court: I have received the following note from the jury: 'Barger's checks to D'Andrea and ledger sheets of Barger's books.
>
> 'The evidence (Barger against D'Andrea).'
>
> 'Barger's testimony against D'Andrea.'
>
> "They wish to have read the evidence of Barger against D'Andrea. *On my way in here I stopped in the jury room* and asked them if that is what they meant about that, if they wanted it read. They said yes. I told them they could go to lunch and we would get it ready and read it to them when we come back.
>
> (Recess until 2:15 P. M.) (After Recess. The jury came into the courtroom.)
>
> The Court: Ladies and gentlemen, do you want all of Mr. Barger's testimony read?

Juror No. 9: Just in regard to the payments of money to Maritote and D'Andrea.

(The testimony was read to the jury, starting at page 2921 and ending on page 2946 of the record.)

The Court: I do not know, there is some more testimony in here. Do you want me to go on, as I imagine there is something on cross-examination. Is there anything more you wish me to read?

The Forelady: That is all.

The Court: All right; you may have those exhibits that you asked for. Will you please hand them to the jury? You may retire and resume your deliberations.

(Jury retired again at 2:42 P. M.)

(The jury came into the courtroom at 4:30 P. M.)

The Court (after reading note from jury): You have requested that the portion of the Judge's charge which deals with the statute of limitations be read to you. It will now be read.

(The portion of the charge incorporated on pages 5224 to 5230 was read to the jury.)

(Jury again retired at 4:45 P. M.)

(The following occurred at 5:54 P. M.)

The Court (after reading note from jury): The jury want the Warner Bros. checks pertaining to moneys paid to Kaufman. Will you please get them and deliver them to the jury?

(At 7 P. M. a recess was taken until 8:30 P. M.)"

At 10:05 P. M. the jury returned and announced the guilty verdict.

We have copied the entire record on the subject and wish to call attention to the fact that the judge makes reference to three notes received by him from the jury. The judge made no effort to incorporate the notes in the record nor does the record show that he exhibited them to counsel. The judge didn't even claim that he had stated all that was contained in the notes. We have no record of

what the jury said and what the judge said when the judge stopped in the jury room. The judge does not undertake to say that he wished to have the record show that he had reported all of his conversation with the jury.

In *Ah Fook Chang* v. *United States*, 91 Fed. (2) 805 (C.C.A. 9) the foreman came into the chambers of the judge, asked a question and received an answer in the presence of counsel and returned to the jury room. Judge Haney said (p. 810):

> "The instant case is not one where the whole jury was instructed directly by the court either orally, or in writing. By instructing one juror to instruct the rest of the jury, the instruction was in fact given to the jury in the absence of appellants, their counsel and out of court, for the juror relaying the instruction would necessarily have done so in the jury room. On that theory reversal is required. *Shields* v. *United States*, 273 U. S. 583. Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. *Little* v. *United States*, 73 Fed. (2) 861. The jury received an instruction second hand, and not by the judge. Chances for error are too great. Presuming the error to be prejudicial, the rule in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, is applicable and requires reversal."

We quote from *Little* v. *United States*, 73 F. 2d 861 (C.C.A. 10), holding that there should be no communication between court and jury except in open court and discussing the effect of error (867):

> "No outsider has any business in the jury room; much harm could result, and that is enough. The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

After the jury retires we submit that even a federal judge is an outsider.

Your Honors will notice that there were a number of communications between the judge and the jury in person and by way of notes no doubt conveyed by the marshal. See *Shields* v. *United States,* 273 U. S. 583. We submit that when the judge read the direct examination of Barger he should have read the cross-examination without consulting the jury.

The Circuit Court of Appeals said:

> "—it appears with certainty that no harm has been done."

We fail to see how language could be more plain than that above quoted from *Little* v. *People,* 73 (Fed. 2) 861. May we suggest that:

> "It is much easier to require the observance of the mandates of the law, than to determine in what cases they may safely be dispensed with." (*Guykowoski* v. *People,* 1 Scammon 476, 480 Illinois.)

In the case at bar the Circuit Court regarded this as a mere informality and concluded that no harm had been done. This holding conflicts with *Little* v. *United States,* 73 F. (2d) 861. The various circuits are in conflict as to how to apply Section 391 of Title 28 U. S. C.

In *Fina* v. *United States,* 46 Fed. (2) 643 (C.C.A. 10), the jury was returned into open court in the absence of the defendant and a question asked by the jury was answered by the judge. We quote (644):

> "The government in this case apparently concedes the action of the trial court in giving, in effect, a supplemental charge to the jury after it had been out deliberating for some time, without notice to the defendant or his counsel, and, in their absence was erroneous, but contends the burden is on defendant to show prejudice. We cannot agree with this contention at all. In fact, the record is silent as to what was said by the court to the jury. Hence to be re-

> quired to show something as prejudicial on which the record is silent, and defendant had no opportunity to hear, would be requiring of defendant the impossible. Such is not the law. This being a criminal case on a charge of felony, if error is shown to have been committed, prejudice will be presumed, unless the contrary is clearly made to appear. Again, the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial."

In the *Fina case* the judge did what he did in open court. There might have been some chance for the defendant to learn from a bailiff, a clerk, a reporter or a bystander what actually transpired. But where the judge steps into the jury room, what chance has a defendant? Judge Pollock, in the *Fina case*, collected some of the authorities including *Lewis* v. *United States*, 146 U. S. 370. There is to be found a note in 22 A. L. R. 241, 261 upon the subject.

The Circuit Court, in the case at bar, said (R. 4196, fol. 4198):

> "But, like other rules for the conduct of trials, it is not an end in itself; and while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. *Dodge* v. *United States*, 258 Fed. Rep. 300; *Rice* v. *United States*, 35 Fed. (2) 689, 696 (C.C.A. 2); *United States* v. *Graham*, 102 Fed. (2) 436, 444 (C.C.A. 2)."

Permit us to review the authorities cited by Judge Hand here:

Dodge v. *United States*, 258 Fed. 300 (C.C.A. 2) The defendant was convicted of espionage. The jury sent a note to the judge to ask if they could convict on the first count. The judge replied "yes". After a review of the authorities, the Circuit Court said:

> "In the instant case it is evidence that no

> possible harm resulted or could result from the communication which passed between court and jury. The communication gave the jury no information which was not contained in the original charge. While the judge should not have done what he did, to reverse on that ground would under the circumstances be so extremely technical that it does not at all approve itself to our judgment."

Your Honors will notice that insofar as is shown by the opinion in the *Dodge case*, the judge did not enter the jury room and the record was made by the judge to show all that transpired which constituted an affirmative showing of no possible prejudice.

Rice v. *United States*, 35 Fed. (2) 689, 696 (C.C.A. 2). In this case the jury asked for the exhibits and the judge was asked over the phone in the presence of counsel what should be done, and it was agreed that the exhibits should be sent out. No case could be further from our case on the facts. The judge in the *Rice case* did not go to the jury room, he did not talk to the jury on the telephone and counsel agreed upon sending out some exhibits. Judge Manton said (696):

> "A belated objection on appeal, urging this to be error, is now presented. The objection is that the trial judge was not personally present in the courtroom throughout the entire trial, and therefore that denied the appellants a trial by jury, due process of law, and a public trial. No such constitutional guaranties were breached by what transpired. The exhibits went in by consent of counsel. This was sufficient. *Dodge* v. *United States*, (C.C.A.) 258 F. 300, certiorari denied 250 U. S. 660, 40 S. Ct. 10, 63 L. Ed. 1194. The failure of the trial judge to be present is not fatal to the judgment. It was a harmless error, if one was committed, which involved no substantial rights of the parties. Section 269 of the Judicial Code as amended, 28 USCA sec. 391."

So your Honors perceive that the objection made in the *Rice case* had nothing to do with our point.

United States v. *Graham*, 102 Fed. (2) 436, 444 (C.C.A. 2) is not in point here. The judge did not enter the jury room and the record in the *Graham case* also shows all that happened which was in writing. After jury had begun its deliberations a copy of the charge was requested and by the court's direction it was sent to jury room just as it had been delivered in open court. It was held that such fact did not require reversal notwithstanding counsel were not present or previously advised of such action. 28 U.S.C.A. Sec. 381 was cited.

We believe that in all cases where communication with the jury by the judge is complained of and the transaction is held to be not error, or the error is held to be harmless, the record has been made to show what transpired and the upper court could see that no harm could have possibly resulted.

The correct rule to be applied where the judge by his misconduct makes it impossible for the defendant to show what transpired, is to presume the error to be prejudicial. The judge and the prosecutor had every opportunity to cause the record to show what actually happened. We quote from *Ray* v. *United States*, 114 F. (2) 508, 513 (C.C.A. 8):

> "Private communications even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure and the judiciary."

In *Wheaton* v. *United States*, 133 (2) 522, 527 (C.C.A. 8) Judge Sanborn reviewed the authorities and said that the law is that if it appears that communications have taken place a presumption arises that they were prejudicial.

Summary of Point Eleven.

The Circuit Court, in the case at bar, improperly failed to state some of the points involved and incorrectly stated others and rendered an opinion which does not disclose the grounds of decision.

Point Eleven.

Opinion Rendered by Circuit Court.

We quote from the dissent by Judge Frank in *United States* v. *Liss*, 137 Fed. (2) 995, 1001, 1002:

"But whatever may be the views of judges about the jury system, it is their duty to maintain the function of the jury in all jury trials, until the jury is abolished by legislation and constitutional amendment. And that means that, in a criminal action tried before a jury, a defendant should not be convicted unless the jury finds him guilty—after a fair trial. Perhaps I am old-fashioned in saying that I believe that the doctrine of 'harmless error' does not dispense with the necessity of a fair trial of a defendant whom the appellate judges believe to be guilty. A jury trial does not seem to me to be fair when it plainly appears that the jury has not been well informed as to the facts. As I understand the fundamental principle of the jury system, we appellate judges do not sit as a jury. It surely follows that we ought not to sustain a verdict of guilty after an unfair trial merely because, upon reading the printed record, we believe that, had we been the jury, we would have convicted. Any other rule has the result that the presence of the jury will often become a mere formality; for then, if only the jury finds guilt, no matter by what unfair tactics it was persuaded to do so, we judges, in actual fact, decide the case.

"I cannot subscribe to a rule that what is substantial reversible error depends not on whether it probably affected the jury to the substantial prejudice of the defendant but on whether we appellate judges think the defendant guilty or innocent. If that is to be the rule, I would urge that criminal jury trials be abolished

as expensive and time-consuming shams. I have known lawyers who assert that only by such a rule can the jury system be made 'workable.' But such a rule renders the jury system workable by not working it; if we happen to think that the jury system is impractical and unworkable, let us frankly say so; then our citizens, informed of the realities, can decide whether to dispense with it.

"At a minimum, if we are to adopt the rule described above, we should make that fact unmistakably clear, so that the public will thoroughly understand what a jury trial now really is—and is not. The 'principle of publicity,' which governs in the American judicial process, calls not only for trials held in public but also for the publication of judicial opinions that disclose the grounds of decisions; that publicity is illusory if the true grounds are not stated. To adopt a rule of decision concerning jury trials without publicizing it prevents the public from knowing how its government operates. That is unwise in a democracy where the workings of all branches of government should be plain to the citizens. There can be no true democracy when citizens are treated like infants who must not be told the facts of life; mysteries as to the workings of government impair one of the most important features of democratic participation—the capacity of citizens intelligently to criticize and seek changes in those aspects of government which they consider undesirable—and breed a sense of frustration and a cynicism which may pave the way to the destruction of democracy."

Conclusion.

In the case at bar, we are certain that the record reveals that the prosecutor could have named anybody from Chicago whom he might believe to be connected with a gang and he could have convicted him without evidence. Worse still, we believe that the record shows that Bioff here was granted an opportunity to be judge, jury and executioner. It is a serious reflection which has been brought on by them-

selves, but the machinery of the court was placed in the hands of an accomplice witness of whom the Circuit Court said (R. 4192) that the fabric was woven out of the testimony of a man with a long, discreditable and criminal past, confessedly guilty of perjury in an earlier examination of the same transactions here in question. We cannot be reasonably sure that Bioff included here only guilty persons. The method adopted by the prosecutors to attain its ends is shown here to be disgraceful. The danger of having caught some who are not guilty at all is real and serious.

The fact that the courts below have paid absolutely no attention to constitutional limitations upon federal jurisdiction is obvious from the record.

We conclude with the words of the late Judge Anderson (173 Fed. 227):

> "To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this."

A "proceeding such as this" and a great deal more unlawful and unjust has been highly successful in the case at bar up to now. Your Honors stand squarely between the constitution and a serious rape of it by the government officials.

Respectfully submitted,

WM. SCOTT STEWART,
Counsel for Petitioners.